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1535
No. 11965.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LANE-WELLS COMPANY, a corporation,

Appellant,

vs.

M. O. JOHNSTON OIL FIELD SERVICE CORPORATION, a corporation,

Appellee.

M. O. JOHNSTON OIL FIELD SERVICE CORPORATION, a corporation,

Cross-Appellant,

vs.

LANE-WELLS COMPANY, a corporation,

Cross-Appellee

OPENING BRIEF FOR DEFENDANT- APPELLANT.

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OPENING BRIEF FOR DEFENDANT- APPELLANT.

This is an appeal by Defendant-Cross-complainant-Appellant-Cross-appellee (hereinafter called Defendant) from final judgment entered by the District Court of the United States, for the Southern District of California, Central Division, holding that claims 7 to 9, inclusive, and 11 to 14, inclusive, of the Lane patent, No. 2,029,491, issued February 4, 1936, for Gun Type Formation Tester,

owned by the Defendant, have not been infringed by the manufacture, use, or sale by Plaintiff-Cross-defendant-Appellee-Cross-appellant (hereinafter called Plaintiff) of the apparatus exemplified by Defendant's Exhibits AH-1, AH-2, and AH-3, and granting an injunction prohibiting Defendant from threatening to sue or suing Plaintiff's customers, dealers, or sellers in infringement litigation with respect to said devices and said patent [Tr. 74-77].

I.

STATEMENT OF JURISDICTION.

The complaint sought declaratory judgment of invalidity and non-infringement of said Lane patent (and also the Spencer patent, No. 2,092,337, issued September 7, 1937, for Formation Testing Apparatus, and owned by Defendant) and asserted jurisdiction to be based on 28 U. S. C. 400 and 274-D, of the Judicial Code [Tr. 3].

The answer to the complaint admitted jurisdiction to be conferred by said sections.

The cross-complaint sought a judgment for infringement of the claims of said Lane patent, No. 2,029,491, and asserted jurisdiction of the Court to depend upon the Patent Laws of the United States [Tr. 30].

The answer to the counterclaim admitted that the jurisdiction of the Court with respect thereto depended upon the Patent Laws of the United States [Tr. 34].

II.

STATEMENT OF THE CASE.

A. The Issues.

The complaint and answer and counterclaim and answer therefor set forth the issues of:

(1) Infringement by the accused apparatus, Defendant's Exhibits AH-1, AH-2, and AH-3, manufactured and used by Plaintiff of claims 7 to 9, inclusive, and 11 to 14, inclusive, of the Lane patent, No. 2,029,491; and

(2) Validity of said claims of said Lane patent.

The Court held valid said claims of the Lane patent, and hence issue (2) above is not presented on this appeal of Defendant.

Findings 47 and 48 are to the effect that these claims of the Lane patent disclose a combination that is new [Tr. 62] and useful [Tr. 63]; conclusions of law 5, 6 and 7 establish that the Lane patent involved more than the work of mechanical skill and involved invention; that the Lane patent describes and claims the alleged invention with definiteness and specificity, R. S. 4888; and that claims 7 to 9, inclusive, and 11 to 14, inclusive, of said Lane patent are valid [Tr. 70].

Issue (1) above is the only issue presented by this appeal of Defendant.

Defendant's appeal is directed to the findings and judgment to the effect that said claims of the Lane patent are

not infringed by Plaintiff's accused apparatus, exemplified by Defendant's Exhibits AH-1, AH-2 and AH-3 [Tr. 71].

The only reason given in the Court's Conclusions of Law for finding non-infringement of the Lane patent claims by the accused devices is set forth in Conclusion 8:

"Inasmuch as the Lane patent in suit No. 2,029,491 was issued February 4, 1936, on an application originally filed in 1932, and no apparatus for practical use has ever been built and commercially used in accordance with it, the patent must be held to be of that class as to which there is no room for equivalents, and the claims thereof must be limited to the precise device shown in the patent; and so limited, plaintiff's accused apparatus, exemplified by defendant's Exhibits AH-1, AH-2 and AH-3, does not infringe the Lane patent in suit, or any of claims 7-9 inclusive, or 11-14 inclusive thereof." [Tr. 71-72.]

The doctrine of the District Court on this issue of infringement of the Lane patent was therefore, it is clear, that infringement of the claims was avoided only if and because the claims were construed as "Limited to the *precise* device shown in the patent" and would be so limited because no apparatus for practical use had been built and commercially used in accordance with such claims between the date of issue, February 4, 1936, and the filing of the complaint on April 10, 1947 [Tr. 11], a period of about ten years, except the accused apparatus built and commercially used by Johnston in January, 1946 [Tr. 395-96].

It is well established that patent drawings are merely illustrative of one example of an embodiment of the invention and are not working drawings and not to scale.

“The specification contains a detailed description, accompanied by drawings, exemplifying one form which the invention may assume. . . .”*

Reinharts, Inc. v. Caterpillar Tractor Co., 85 F. 2d 628, at 631 (C. C. A. 9, 1936).

“. . . But the drawings are not required to be working plans. They must be read in connection with the description and claims, and any inferences arising from omissions or inconsistencies in the drawings must yield to a legally sufficient specification. ‘Many material objects and operations,’ says Robinson (vol. 2, §491), ‘are so familiar to the inventor and his readers that their specific description, or even an allusion to them, would be superfluous. . . .’”

Western Telephone Mfg. Co. v. American Electric Telephone Co., 131 Fed. 75, at 77 (C. C. A. 7, 1904).

See also:

Manhattan Book Casing Mach. Co. v. E. C. Fuller Co., 204 Fed. 286, at 287 (C. C. A. 2, 1913);

World v. Thayer & Chandler, 148 Fed. 227, at 229 (C. C. A. 7, 1906);

Crown Cork & Seal Co. of Baltimore City v. Aluminum Stopper Co. of Baltimore City, 108 Fed. 845, at 849 (C. C. A. 4, 1901);

American Valve & Meter Co. v. Fairbanks, Morse & Co., 249 Fed. 234, at 239 (C. C. A. 7, 1917);

Johnston v. Woodbury, 109 Fed. 567, at 569 (C. C. A. 9, 1901).

*All underscoring throughout this brief is ours.

It is likewise well established that the specification of a patent need describe only one, and not necessarily the commercially best, embodiment of the invention, so long as it describes a structure embodying the invention operative for the intended purpose of the invention.

Referring to a patent upon a tractor, this Court of appeals held:

“Appellant contends that the tractor described in the Wickersham specification is a ‘frameless’ tractor, and that the accused tractor is not of that type and, therefore, cannot be said to infringe the Wickersham patent. This contention must fail. Wickersham’s invention is defined, not by the specification, but by the claims of his patent. Smith v. Snow, 294 U. S. 1, 11, 55 S. Ct. 279, 79 L. Ed. 721; Altoona Publix Theatres v. American Tri-Ergon Corporation, 294 U. S. 477, 487, 55 S. Ct. 455, 79 L. Ed. 1005; Continental Paper Bag Co. v. Eastern Paper Bag Co., *supra*, 210 U. S. 405, at page 419, 28 S. Ct. 748, 52 L. Ed. 1122. . . .”

Reinharts, Inc. v. Caterpillar Tractor Co., supra, at 633-34.

“ . . . But he is not confined to that particular mode of use since the *claims* of the patent, not its specifications, measure the invention. Paper Bag Patent Case (Continental Paper Bag Co. v. Eastern Paper Bag Co.), 210 U. S. 405, 419, 52 L. ed. 1122, 1128, 28 S. Ct. 748; McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 116, 40 L. ed. 358, 361, 16 S. Ct. 240; Winans v. Denmead, 15 How. 330, 343, 14 L. ed. 717, 722. While the claims of a patent may incorporate the specifications or drawings by reference, see Snow v. Lake Shore & M. S. R. Co., 121

U. S. 617, 630, 30 L. ed. 1004, 1008, 7 S. Ct. 1343, and thus limit the patent to the form described in the specifications, it is not necessary to embrace in the *claims* or describe in the specifications all possible forms in which the claimed principle may be reduced to practice. It is enough that the principle claimed is exemplified by a written description of it. . . .”

Smith v. Snow, 294 U. S. 1, 55 S. Ct. 279, 79 L. Ed. 721, at 728 (1935).

It will be obvious to this Court that, if a patent is limited in its construction “to the precise device shown” in the specification and drawing of the patent, the patent can be avoided by anyone if a spring or lever is shown in the drawing and described in the specification and the appropriator uses a different kind of spring or a cam as a substitute for the lever, he avoids infringement.

Therefore, a construction of patent claims limiting them “to the precise device shown” in the specification and drawing of the patent is a holding of such unenforceability of the patent as to render it completely invalid for all effective purposes.

Clearly, therefore, a holding that the Lane patent or any patent shall be limited in the construction given its claims “to the precise device shown” in the specification and drawing of the patent, which is only an example of embodiments of the invention, is a holding of unenforceability of the patent, rendering it invalid for all practical purposes. The doctrine of non-use by the patentee of the subject matter of his patent, rendering the patent unenforceable, is therefore a doctrine that non-use by the patentee of the subject matter of his patent invalidates his patent.

This appeal is brought by the Defendant-Cross-appellant seeking to have this Court reject this doctrine of the decision of the District Court.

This Court has heretofore rejected the application of this precise doctrine by reversing the decision of a District Court which applied it, thus establishing the law of this Circuit to be that this precise doctrine shall not be applied.* The decision of the District Court in this case makes it necessary for this Court to again reject the doctrine that non-use of the patent limits its claims to the exact device illustrated and described in the patent, thus rendering the patent unenforceable and in effect invalid.

B. The Facts.

(1) The Patent in Suit and the Infringing Apparatus.

The Lane patent, No. 2,029,491, issued February 4, 1936, for Gun Type Formation Tester, is owned by the Defendant [Finding 4, Tr. 53], and claims 7 to 9, inclusive, and 11 to 14, inclusive, are in issue [Finding 77, Tr. 69].

Representative of these claims are claims 14 and 7:

“14. In combination; a packer for dividing a well bore into two zones; gun means connected with the packer for firing a projectile into the formation surrounding the well bore to open one of said zones to flow of fluids from said formation along the path formed by said projectile; and means for entrapping for withdrawal, fluid entering the perforated zone and having an intake passage connectible with said fluid receiving zone, said means adapted to be lowered

**Reinharts, Inc. v. Caterpillar Tractor Co.*, *supra*.

with said packer and gun means and forming a tool entity therewith.”

“7. In combination; a packer adapted when set to divide a well casing into upper and lower zones; and a gun means suspended from said packer in said lower zone; said gun means arranged to drive a projectile through the surrounding well casing.” [Tr. 483.]

The invention, an example of an embodiment of which is by way of illustration described in the specification and shown in the drawing, comprises the combination of a packer which can be set in an oil well casing to divide it into upper and lower zones with a gun assembled beneath the packer for perforating the casing and a formation testing device assembled in the unitary tool above the packer, so that, when the packer is set and the gun is operated and the casing perforated, the fluid from outside the casing may flow through the perforation and into the formation testing device.

The parts of the tool hereinbefore described are assembled as a unit, so that the tool may be lowered into the well and removed therefrom as a unit, avoiding the prior practice of lowering the gun alone in the casing, perforating the casing, withdrawing the gun from the casing, subsequently lowering a formation testing device and a packer to as nearly adjacent the perforation as the operator can, setting the packer, opening the formation testing device to entrap a sample, and withdrawing from the casing the formation testing device.

The embodiment of the invention set forth by way of example in the specification and drawings of the Lane patent leaves it to the operator to withdraw the sample entrapped in the formation testing device by such well known tools as bailers or such well known practices as employing

a liquid cushion above the sample before the packer is released and a bean or choke at the surface of the ground controlling the rate of flow [Finding 31, Tr. 58].

The use of such a combined tool as that shown by way of example in the specification and drawings of the Lane patent, as contrasted with the use of a formation tester and gun perforator separately, results in obtaining a formation sample such as could not be obtained using such tools separately [Finding 42, Tr. 61].

The Court below found the invention of the Lane patent to be a useful one [Finding 48, Tr. 63].

Plaintiff has manufactured and used such a combined gun perforator and formation tester as exemplified by Defendant's Exhibits AH-1, AH-2 and AH-3 [Finding 77, Tr. 69] since January, 1946 [Tr. 395-96], which contains all of these elements. The manufacture and use of such apparatus are asserted to infringe each of the above identified claims.

(2) Infringement Is Established if the Doctrine Applied by the Court Below is Rejected.

(a) THE INFRINGEMENT OF THE CLAIMS OF THE LANE PATENT, IF GIVEN THE ORDINARY CLEAR MEANING OF THE WORDS THEY EMPLOY, WAS REPEATEDLY ADMITTED BY PLAINTIFF.

Paragraph VII of the complaint recites:

"That in the event that claims numbered 7, 8, 9, 11, 12, 13 and 14 of Letters Patent No. 2,029,491 . . . are valid and interpreted and applied literally as worded, that the same can be read upon the Johnston Perforator and Formation Tester manufactured, operated and used by this plaintiff and would be infringed thereby." [Tr. 5].

This admission was repeatedly made by Plaintiff's counsel during the trial, an example thereof being as follows:

"The Court: If they are as broad as claimed and are valid [42] in that breadth, to that extent, you freely concede there has been infringement.

"Mr. Mellin: I think the court just put, in other words, exactly what I pleaded.

"Mr. Foster: That applies to both patents, Mr. Mellin?

"Mr. Mellin: Of course. [43]." [Tr. 98.]

- (b) THE CLAIMS OF THE LANE PATENT WERE CONSIDERED BY THE COURT TO BE INFRINGED IF GIVEN THE ORDINARY CLEAR MEANING OF THE WORDS THEY EMPLOY.

It follows from the fact that the claims of the Lane patent were held valid by the Court below [Finding 7, Tr. 70] that the lower Court considered it unnecessary to read or construe the claims in any other manner to avoid the prior art.

From this it follows that the only reason for the lower Court's construing the claims in a different manner and as "limited to the precise device shown" in the specification and drawings of the patent was to avoid a holding of infringement of such claims by the Plaintiff's devices.

- (c) THE RECORD ESTABLISHES THAT THE ACCUSED DEVICE CONTAINS ALL OF THE ELEMENTS AND PERFORMS ALL OF THE OPERATIONS OF THE DEVICE DEFINED BY THE CLAIMS IN ISSUE.

This is established by the testimony of Plaintiff's own witness O'Neill and was accepted by the Court below, for it ordered that:

"(1) The Findings of Fact and Conclusions of Law heretofore made are amended as follows: [84]

“(a) After Finding of Fact No. 19 add:

“—The following steps in the performance and use of the tool of the Lane patent in suit, No. 2,029,491, is described in such Lane patent, are identical with the steps in the performance and use of the Johnston accused tool as exemplified by Defendant's Exhibits AH-1, AH-2, and AH-3:

“1. The elements are assembled into a combined tool including a gun perforator, packer, and tester.

“2. The combined tool is lowered in the well to the point where it is desired to perforate.

“3. The gun is fired to perforate the casing.

“4. Several guns are fired successively.

“5. The drill pipe is rotated one turn to the left to unlatch the packer and set the slips.

“6. The weight of the drill pipe is lowered on the slips to set the packer.

“7. The drill pipe or tubing is open to the formation below the set packer.

“8. The entrance valve into the tool is left open until a sufficient quantity of the test liquids is secured in the tool.— [85]” [Tr. 78.]

It is clear, therefore, that, if the doctrine of limitation for non-use by the Court below be rejected and the claims of the Lane patent be construed in accordance with the ordinary and clear meaning of their terms, these claims are clearly infringed by the accused structure, and that the determination of whether such doctrine of non-use be applied is wholly determinative of the issue of infringement.

III.

SPECIFICATION OF ERRORS.

The asserted errors of the District Court that are relied upon by the Defendant are as follows:

(1) The District Court erred in limiting the claims of the Lane patent, No. 2,029,491, “to the precise device shown in the patent” [Tr. 70].

(2) The Court erred in finding and concluding no infringement by the manufacture and use of Plaintiff’s devices exemplified by Defendant’s Exhibits AH-1, AH-2 and AH-3, of claims 7 to 9, inclusive, and 11 to 14, inclusive, of the Lane patent, No. 2,029,491 [Finding 77, Tr. 69; Conclusion of Law 8, Tr. 75].

(3) The Court erred in not finding infringement by the manufacture and use of Plaintiff’s devices exemplified by Defendant’s Exhibits AH-1, AH-2 and AH-3 of claims 7 to 9, inclusive, and 11 to 14, inclusive, of the Lane patent, No. 2,029,491.

(4) The Court erred in rendering judgment of non-infringement by the manufacture and use of Plaintiff’s devices exemplified by Defendant’s Exhibits AH-1, AH-2 and AH-3 of claims 7 to 9, inclusive, and 11 to 14, inclusive, of the Lane patent, No. 2,029,491.

IV.

SUMMARY OF ARGUMENT.

A. THE DOCTRINE OF THE DECISION OF THE DISTRICT COURT IS CONTRARY TO STATUTORY LAW, AN UNJUST EXTENSION THEREOF, AND CONSTITUTES JUDICIAL LEGISLATION. THE STATUTES DEFINE THE PREREQUISITES TO THE ISSUE OF A VALID PATENT.

B. THE DOCTRINE OF THE DECISION OF THE DISTRICT COURT IS CONTRARY TO THE INTENT OF THE CONSTITUTIONAL PROVISION AUTHORIZING THE GRANT OF LETTERS PATENT.

C. THE DOCTRINE OF THE DECISION OF THE DISTRICT COURT DEFEATS THE PURPOSE OF THE EXISTENCE OF THE UNITED STATES PATENT OFFICE AND RENDERS FUTILE THE EFFORTS OF PATENT COUNSEL AND THE EXPENSE OF INVENTORS IN PROSECUTING AND THE CARE OF THE PATENT OFFICE EXAMINERS IN DETERMINING THE SCOPE OF PATENT CLAIMS TO BE ALLOWED THE INVENTOR IN A PATENT.

D. THE DOCTRINE OF THE DECISION OF THE DISTRICT COURT RENDERS UNCERTAIN TO CHAOS THE RIGHTS OF A PATENTEE AND THE PRIVILEGE OF OTHERS TO USE WITH IMMUNITY THE INVENTION OF PATENTEE.

(1) WHAT PERIOD OF NON-USE SHALL DETERMINE THE UNENFORCEABILITY AND EFFECTIVE INVALIDITY OF THE PATENT AND THE IMMUNITY OF OTHERS TO APPROPRIATE IT?

(2) WHAT CIRCUMSTANCES SHALL AFFECT THE PERIOD OF NON-USE MAKING THE PATENT UNENFORCEABLE AND IN EFFECT INVALID AND GRANTING IMMUNITY TO OTHERS APPROPRIATING ITS INVENTION?

(3) HOW SHALL THE CIRCUMSTANCE OF THE PATENTEE INVENTING AHEAD OF HIS TIME AFFECT THE PERIOD OF NON-USE DETERMINATIVE OF THE APPLICATION OF THE DOCTRINE OF THE DISTRICT COURT?

E. THE DOCTRINE OF EQUIVALENTS IS NOT NEEDED OR APPLICABLE HERE.

F. THE DOCTRINE OF THE DECISION OF THE DISTRICT COURT IS CONTRARY TO THE ESTABLISHED LAW OF THIS CIRCUIT.

V.

ARGUMENT.

A. The Doctrine of the Decision of the District Court Is Contrary to Statutory Law, an Unjust Extension Thereof, and Constitutes Judicial Legislation. The Statutes Define the Prerequisites to the Issue of a Valid Patent.

These requisites to patentability defined by the statutes of novelty, usefulness, and invention in the subject of the patent (R. S. 4886; 35 U. S. C. 31) and a full disclosure in the specification and a distinct claiming of the invention in the patent (R. S. 4888; 35 U. S. C. 33) are all of the prerequisites defined by any of the statutes.

To these five prerequisites the doctrine of this decision would add a sixth not required or suggested as necessary by any of the statutes, *i. e.*, use by the owner of the patent of the invention of the patent prior to the use of such invention by an appropriator.

B. The Doctrine of the Decision of the District Court Is Contrary to the Intent of the Constitutional Provision Authorizing the Grant of Letters Patent.

The constitutional provision under which all of the federal statutes on the subject of patents have been enacted is Article I, Section 8, Clause 8:

“The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

On the basis that, if every Congress which has legislated under this constitutional provision upon the subject of patents (a fact, so far as the writer of this brief can determine) understood this constitutional provision to mean that Congress, and Congress alone, should have the power to determine the extent of the limited time for which letters patent should be granted to secure to inventors their exclusive rights, it is urged that such was the intent of this provision of the Constitution.

If this be true, the Courts should not determine the extent of this limited time as did the Court below in applying its doctrine that non-use by the inventor rendered unenforceable and effectively invalid his patent short of the term prescribed by Congress.

Pursuant to this provision of the Constitution, Congress enacted a statute providing:

“Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery . . . throughout the United States and the territories thereof”

R. S. 4884, 35 U. S. C. 40.

The application of its doctrine of non-use by the Court below has as regards Defendant repealed this Federal statute by making the enforceability and effectively valid life of the Lane patent ten years instead of seventeen.

Such a doctrine and its application should be rejected by this Court.

C. The Doctrine of the Decision of the District Court Defeats the Purpose of the Existence of the United States Patent Office and Renders Futile the Efforts of Patent Counsel and the Expense of Inventors in Prosecuting and the Care of the Patent Office Examiners in Determining the Scope of Patent Claims to Be Allowed the Inventor in a Patent.

As this Court is well aware, applications for United States Letters Patent are usually pending for a number of years before the patent is issued. During this time, the applicant and his patent counsel and the examiners in the Patent Office are carefully studying the prior art to determine the precise scope of the claims to be contained in the issued patent to the end that the applicant for the patent shall be issued a patent, the claims of which cover all that he is entitled to under the statutory law and nothing more. When this has been determined after searches of the prior art by the Patent Office examiners, numerous amendments, and modifications of claims by the applicant, and sometimes conferences between applicant and his counsel and the examiners, the patent is issued with claims approved by the United States Patent Office as covering applicant's invention and no more.

If in accordance with the doctrine of the decision of the District Court here the scope of these issued claims so carefully framed and approved by the United States Patent Office are to be modified by a construction contrary to their plain terms because of non-use of the claimed invention by the patent owner, obviously, all of this effort, care, and expense by the United States Patent Office, the applicant, and his counsel are lost.

D. The Doctrine of the Decision of the District Court Renders Uncertain to Chaos the Rights of a Patentee and the Privilege of Others to Use With Immunity the Invention of Patentee.

The Lane patent issued February 4, 1936. Plaintiff commenced to make and use apparatus defined by the claims of the Lane patent in January, 1946, as conceded by Plaintiff [Tr. 98]. The complaint herein was filed April 10, 1946 [Tr. 11].

The Court held here that, because the owner of the Lane patent had not used commercially the invention of the patent from its date of issue to such latter dates, the doctrine that the claims would be revised and limited to the precise device illustrated and described in the patent by way of example should be applied.

If this doctrine be accepted by this Court, no patentee can tell the circumstances of non-use of his patented invention which render it unenforceable and in effect invalid; and no competitor can determine what period of non-use and circumstances affecting it are sufficient to enable him to appropriate the claimed invention with immunity.

(1) What Period of Non-Use Shall Determine the Unenforceability and Effective Invalidity of the Patent and the Immunity of Others to Appropriate It?

Here the period was ten years. If the period were eight years or two years, should the doctrine be applied? There is no guide for the determination of this question in the decision of the District Court, and patentees and potential infringers are left completely in the dark as to the period of non-use determinative of the application of the doctrine of the District Court if this Court accepts it.

(2) What Circumstances Shall Affect the Period of Non-Use Making the Patent Unenforceable and in Effect Invalid and Granting Immunity to Others Appropriating Its Invention?

Here the patent owner, during part of the non-use period, was in war work and, during all of such period, was building up a substantial business in an allied field.

Here a licensee was licensed at a substantial royalty rate prior to judgment herein [Tr. 688], and licensor collected substantial royalty from such licensee [Tr. 467-68].

If such circumstances are sufficient to make a period of non-use by the patentee of 10 years sufficient to render the patent unenforceable and in effect invalid, how much lesser period of non-use would be required for the application of the doctrine if these circumstances were not present?

If the patent owner had been in vital war work for the entire period of non-use, would the period of non-use sufficient for the application of the doctrine be less than the period here involved?

Had the patentee been unable because of lack of funds to commercially develop the invention of the patent, would the period of non-use sufficient for the application of the doctrine of the District Court be less or greater than the period here involved, and who can evaluate, interrelate, and determine the effect of these various and other pertinent factors?

Obviously, if the doctrine of the District Court be adopted by this Court, the answer is that only the District Court and this Court and the Supreme Court can determine the value and effect of all such circumstances

and related factors in determining the period of time for the application of the doctrine.

The patent owner cannot determine this in advance nor can the appropriator of the invention. Before the enunciation of this doctrine, the patentee could reasonably rely upon his right to enforce his patent during its full term of seventeen years, regardless of non-use by him. Before the application of this doctrine, the potential appropriator could reasonably determine that he could not with immunity appropriate the invention during the term of seventeen years of the patent as defined by statutory law, regardless of any non-use of the patent by its owner.

With the acceptance of this doctrine by this Court, patent owners and potential appropriators are deprived of this opportunity to establish with reasonable certainty the respective rights without taking the question through the Federal Courts.

(3) How Shall the Circumstance of the Patentee Inventing Ahead of His Time Affect the Period of Non-Use Determinative of the Application of the Doctrine of the District Court?

Obviously, some inventions are a great departure from the prior art and more revolutionary than others, and hence require more time after the issue of the patent for acceptance by the trade and public than such others.

Is such an inventor to be penalized? Is one inventor to be penalized over another, because his invention is more novel, inventive, and revolutionary than the other by having applied to his patent this doctrine of the District Court holding it unenforceable and in effect invalid because of a longer period of non-use than that of the other inventor?

This manifestly is unfair, and yet the acceptance of the doctrine of the District Court by this Court will make it necessary for the doctrine to be applied in this obviously unfair manner or for the Court to determine the degree of novelty, inventiveness, departure from the prior art, and revolutionary aspects of each invention and weigh this determination against all the other related circumstances and factors in determining the period of non-use which shall cause the doctrine of the District Court to be applied.

E. The Doctrine of Equivalents Is Not Needed or Applicable Here.

The lower Court found:

“Inasmuch as the Lane patent in suit, No. 2,029,-491, was issued February 4, 1936, on an application originally filed in 1932, and no apparatus for practical use has ever been built and commercially used in accordance with it, the patent must be held to be of that class as to which there is no room for equivalents . . .” [Finding 8, Tr. 71].

We urge that this finding that the application of the doctrine of equivalents avoided infringement is based upon a misconception of the lower Court that the doctrine of equivalents applies to narrow the language of a claim; whereas, in fact it applies only to enlarge the language of the claim to hold as an infringement a device having elements different from but equivalent to those contained in the claim.

It is submitted also that this finding was based upon a misconception that the equivalents to be found in the infringing device were equivalents of the elements described and illustrated in the specification and drawing

of the patent; whereas, the elements to be found in the infringing device must be equivalents of the elements set forth in the claims of the patent.

As said by Judge Learned Hand:

“ . . . The doctrine of equivalents, though well settled for many years, is anomalous, if the claim is measured only by its words, and for this reason we once went so far as to say that it means no more than that the language of claims shall be generously construed. *Motion Pictures Co. v. Independent Co.*, 200 F. 411 (C. C. A. 2). Such a limitation is however irreconcilable with those extremely numerous decisions which have extended a claim to structures which by no possibility it could cover, judged by any tenable canons of documentary interpretation. *Winans v. Denmead*, 15 How. 330, 343, 14 L. Ed. 717; *Blake v. Robertson*, 94 U. S. 728, 24 L. Ed. 245; *Clough v. Gilbert & B. Mfg. Co.*, 106 U. S. 166, 1 S. Ct. 188, 27 L. Ed. 134; *Royer v. Schultz Belting Co.*, 135 U. S. 319, 10 S. Ct. 833, 34 L. Ed. 214; *Hoyt v. Horne*, 145 U. S. 302, 12 S. Ct. 922, 36 L. Ed. 713; *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.*, 61 F. 958 (C. C. A. 1); *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 69 F. 371 (C. C. A. 6); *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 101 F. 716 (C. C. A. 6) . . . ”

Claude Neon Lights, Inc. v. E. Machlett & Son, 36 F. 2d 574, 575 (C. C. A. 2, November 11, 1929). (Rehearing, December 21, 1929.)

F. The Doctrine of the Decision of the District Court Is Contrary to the Established Law of This Circuit.

In the case of *Reinharts, Inc. v. Caterpillar Tractor Co.*, 85 F. 2d 628 (C. C. A. 9, 1936), there was made by the defendant the contention that the doctrine applied by the Court below should be there applied. In this contention the defendant had been successful in the Court below, and this Court reversed the decision on that ground. This Court held:

“Appellant says that the inventions covered by the Turnbull, Holt, Wickersham and Whitacre patents are ‘not in practical use.’ Therefore, appellant contends, these are ‘mere paper patents,’ and each of them ‘must be strictly limited to the structure as specifically described in its specifications and drawings’ . . .

“ . . . Furthermore, appellant’s proposition—that these patents, if not in practical use at the time of the trial, must be strictly limited to the structure specifically disclosed in their specifications and drawings—cannot be sustained. The authorities cited by appellant do not lay down any such rule. They merely hold that long-continued non-use of a patented invention may have a bearing on the construction to be given the patent, and that the courts, in construing such a patent, are not disposed to give it a broader scope than is clearly required. They do not hold that such a patent must be strictly limited to the specific structure disclosed in its specifications and drawings. Much less do they hold that a patent must be so limited, merely because of non-use at

the time of the trial. A patented invention, whether used or unused, is measured, not by the specifications and drawings, but by the claims of the patent. See authorities heretofore cited . . .” (p. 636.)

By this decision some thirteen years ago, this Court has established the law of this Circuit to be that non-use by the patent owner does not authorize a District Court to construe the claims of the patent as limited to the precise device specifically described in the specification and drawing of the patent. This law of the Circuit has continued for thirteen years. The decision below, here appealed from, is contrary to such established law and should be reversed.

Conclusion.

For the reasons and upon the evidence and the findings and the law hereinbefore set forth, Defendant respectfully submits that the judgment of the lower Court should be reversed as to Paragraph 7 [Tr. 75], Paragraph 9 in so far as it relates to the Lane patent, No. 2,029,491 [Tr. 76], and Paragraph 10 [Tr. 77]; that findings of fact and conclusions of law inconsistent with the striking and modifying of said judgment be likewise stricken or reversed, and that claims 7 to 9, inclusive, and 11 to 14, inclusive, of the Lane patent, No. 2,029,491, be held valid and infringed by the manufacture and use of devices exemplified by Defendant's Exhibits AH-1, AH-2, and AH-3.

Dated at Los Angeles, California, this 7th day of March, 1949.

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No. 11,965

IN THE
United States Court of Appeals
For the Ninth Circuit

M. O. JOHNSTON OIL FIELD SERVICE
CORPORATION,

Appellant,

vs.

LANE-WELLS COMPANY, a corporation,

Appellee.

OPENING BRIEF ON BEHALF OF APPELLANT,
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IN THE

United States Court of Appeals
For the Ninth Circuit

M. O. JOHNSTON OIL FIELD SERVICE
CORPORATION,

Appellant,

vs.

LANE-WELLS COMPANY, a corporation,

Appellee.

OPENING BRIEF ON BEHALF OF APPELLANT,
M. O. JOHNSTON OIL FIELD SERVICE CORPORATION.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1292 of the *New Judicial Code*, as the suit is one arising under the patent laws of the United States, of which the District Court had jurisdiction under Section 24(7) of the *Judicial Code* as amended (28 U.S.C.A., Section 41(7)) and under Section 247D of the *Judicial Code* (Federal Declaratory Judgments Act, 28 U.S.C.A., Section 400).*

*Throughout this brief plaintiff below, M. O. Johnston Oil Field Service Corporation, will be referred to as "appellant Johnston" and defendant below, Lane-Wells Company, a corporation, will be referred to as "appellee Lane-Wells".

Reference to the Transcript of Record will be made by referring to said Record by the letter "R." followed by the number of the page referred to.

All emphasis ours unless otherwise noted.

Final judgment of the District Court was entered on February 26, 1948 (R. 77) and the notice of appeal, on behalf of appellant Johnston was filed May 11, 1948. (R. 81.)

BRIEF STATEMENT OF CASE.

This is an appeal (in the nature of a cross-appeal) by appellant Johnston, from a judgment of the United States District Court for the Southern District of California, adjudging United States Letters Patent No. 2,029,491 (R. 74), issued February 4, 1936, to be valid but not infringed by appellant, Johnston.

The patent in suit No. 2,029,491 is owned by the appellee Lane-Wells. The suit was instituted by the appellant, Johnston, under the patent statutes of the United States and under the Declaratory Judgments Act, Title 28, Section 400 U.S.C., after a controversy had arisen between appellant, Johnston, and appellee, Lane-Wells, concerning the validity of the patent and whether or not the acts of appellant, Johnston, constituted an infringement thereof.

The complaint (R. 2) prayed for a declaratory judgment that the acts of appellant Johnston did not infringe the patent in suit and that said patent and all the claims thereof were invalid.

The patent in suit No. 2,029,491 purports to broadly cover the combination of a well testing device (whether old or new in the art) regardless of its construction and mode of operation, and a perforating gun

(whether old or new in the art) regardless of its construction and mode of operation.

After trial, the District Court adjudged the patent in suit and the claims thereof to be valid, but adjudged that they were not infringed by the acts of appellant, Johnston. From this judgment appellee, Lane-Wells, appealed from that portion of the judgment of non-infringement, and appellant, Johnston (by this appeal), appealed from that portion of the judgment holding the patent in suit and the claims thereof valid.

The questions on this appeal by appellant, Johnston, are briefly:

Is the patent in suit valid in view of

(a) the evidentiary findings of fact made by the trial Court which we contend conclusively show lack of patentable invention in the production of the apparatus of the patent in suit;

(b) the evidentiary findings of fact made by the trial Court which we contend conclusively show that the patent is for a mere aggregation and not for a patentable combination;

(c) the evidentiary findings of fact made by the trial Court which we contend conclusively show that the apparatus of the patent in suit is inoperative and will not work practically in industry;

(d) the evidentiary findings of fact made by the trial Court which we contend conclusively show that the patent in suit is invalid for failure to comply with

R. S. § 4888, in that it fails to illustrate and describe an operative structure having utility?

Are not the claims of the patent in suit invalid in that they fail to comply with R. S. § 4888, because they are functional, ambiguous and indefinite?

The evidentiary findings of fact relied upon are not in conflict or dispute in this appeal in that they are all based upon substantial and uncontradicted evidence. It is only the ultimate findings and conclusions of "invention" and "validity" which are contended by appellant, Johnston, to be in error. It is our contention that in the state of the evidentiary facts specifically found by the District Court that the District Court erred in making its ultimate findings and conclusions that the patent involved invention and was valid. Thus, this case does not fall within the rule of the *Brodie* case (*Ralph N. Brodie Co. v. The Hydraulic Press Mfg. Co.*, 151 Fed. (2d) 91, but within the rule of *Kuhn v. Princess* (3 Cir.) 119 Fed. (2d) 704, which is as follows:

"The appellee reminds us that we are not at liberty to disturb findings of fact made by the trial court unless they are unsupported by evidence or are otherwise clearly erroneous. Rule 52(a), 28 U.S.C.A. following section 723c.

* * * * *

The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings. And so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate infer-

ences and conclusions which, in its opinion, the findings reasonably induce. * * * Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action. Cf. *United States v. South Georgia Railway Co.*, 5 Cir., 107 F. 2d 3, and *United States v. Mitchell*, 8 Cir., 104 F. 2d 343, 346. An incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52(a) specifically provides."

This Court approved the rule of that case in the case of *Home Indemnity Co. of New York v. Standard Acc. Ins. Co. of Detroit*, 167 Fed. (2d) 919. See also *Murray v. Novlesville Milling Co.*, 131 Fed. (2d) 470.

SPECIFICATION OF ERRORS.

1. The Court erred in finding and concluding that the Lane patent in suit No. 2,029,491 discloses a patentable invention, in that such finding and conclusion is contrary to the evidence and the evidentiary findings of fact.

2. The District Court erred in finding and concluding that claims 7 to 9, inclusive, and 11 to 14, inclusive, of the patent in suit complied with R. S. § 4888 and are valid in that such finding and conclusion is contrary to the evidence and the evidentiary findings of fact.

3. The District Court erred in finding and concluding that the Lane patent in suit is valid as to claims 7 to 9, inclusive, and 11 to 14, inclusive, in that such finding and conclusion is contrary to the evidence and the evidentiary findings of fact.

4. The District Court erred in not finding and concluding that the Lane patent in suit does not disclose a patentable invention, which finding and conclusion would be in accord with the evidence and the evidentiary findings of fact.

5. The District Court erred in not finding and concluding that claims 7 to 9, inclusive, and 11 to 14, inclusive, of the Lane patent do not comply with R. S. § 4888 and are invalid in that they are functional, vague and indefinite.

6. The District Court erred in not finding and concluding that the Lane patent is invalid as to claims 7 to 9, inclusive, and 11 to 14, inclusive, which finding and conclusion would be in accord with the evidence and the evidentiary findings of fact.

7. The District Court erred in not finding and concluding that the Lane patent is totally invalid, which finding and conclusion would be in accord with the evidence and the evidentiary findings of fact.

8. The District Court erred in not finding and concluding that the Lane patent in suit purports to cover a mere aggregation and not a patentable combination and is therefore invalid, which finding and conclusion would be in accord with the evidence and the evidentiary findings of fact.

9. The District Court erred in not finding and concluding that it required no more than mechanical skill to produce the apparatus of the patent in suit, and that said patent is therefore totally invalid, which finding and conclusion would be in accord with the evidence and the evidentiary findings of fact.

10. The District Court erred in not finding and concluding that the patent in suit purports to cover a mere use of an old tool or tools and therefore does not embody a patentable invention and is invalid, which finding and conclusion would be in accord with the evidence and the evidentiary findings of fact.

11. The District Court erred in not finding and concluding that the patent in suit does not describe and illustrate an apparatus which will work practically in industry and therefore it does not describe and illustrate the claimed invention as required by R. S. § 4888, and is therefore invalid, which finding and conclusion would be in accord with the evidence and the evidentiary findings of fact.

12. The District Court erred in not finding and concluding that all of the claims of the patent in suit are so functional, ambiguous and indefinite that they fail to comply with R. S. § 4888, and are therefore invalid, which finding and conclusion would be in accord with the evidence.

13. The District Court erred in not finding and concluding that the apparatus disclosed in the patent in suit will not work practically in industry when constructed and operated in accordance with the speci-

fications and drawings of the patent, and therefore the patent is totally invalid, which finding and conclusion would be in accord with the evidence and the evidentiary findings of fact.

SUMMARY OF THE ARGUMENT.

1. The District Court found (Finding 18, R. 56) that the circumstance which gave rise to the alleged invention of the apparatus of the patent in suit was that after the inventor had demonstrated that electrical control of perforator guns at the top of a well for firing such a gun perforator was safe, appellee, Lane-Wells, desired to cover by means of patents every possible application that the perforating gun might have and every means by which it might be operated, and we contend that in that state of fact the patent is invalid because it is for a "use" of a perforator gun and tester and the patent is therefore invalid.

2. That from the evidentiary findings of fact (Findings 18, 19, 22, 34, 35 and 36, R. 56, 57 and 60) made by the District Court and the evidence, it is clear that the patent in suit purports to patent a bare abstract "idea", and that the patent is invalid because of conception of a bare abstract "idea" and not an invention which can be patented. That the invention, if any, must be found in an apparatus to carry out the bare abstract "idea".

3. That from the evidentiary findings of fact (Findings 50 and 58, R. 63 and 64) made by the Dis-

trict Court and from the evidence, it is clear that one skilled in the art could, by merely exercising ordinary mechanical skill, produce an apparatus carrying out the bare abstract "idea" constituting the alleged invention into effect, and that therefore no patentable invention is disclosed in the patent in suit and it is invalid.

4. That the District Court found as fact (Findings 67, 68 and 69, R. 66 and 67) that in the accused apparatus the gun perforator separately performs its same old function in its same old manner, and the formation tester separately performs its same old function in its same old manner, and that the separate functioning of the gun does not modify or change the functioning of the formation tester, and that the separate functioning of the formation tester does not change or modify the functioning of the gun, and that they do not contribute to any joint function. From this it is evident that the result or end produced by the alleged "combination of the patent" is merely the sum of two separate and old results. Therefore, the patent and its claims which purport to include the accused apparatus is for an unpatentable aggregation and is totally invalid.

5. That from the evidentiary findings of fact (Findings 49, 50 and 59, R. 63 and 64) and the evidence, it is manifestly clear that only mechanical skill is required to connect an old perforator gun to an old formation tester, and therefore the patent which purports to cover such an aggregation is void for want of invention.

6. That from the evidentiary findings of fact (Findings 34 and 35, R. 59) made by the District Court and the evidence, it is manifestly clear that the apparatus shown in the Lane patent in suit will not work practically in industry when constructed and operated in accordance with the specifications and drawings of the patent, and that therefore the patent is totally and completely invalid.

7. That from the findings of fact (Findings 49, 68, 69 and 70, R. 63 and 67) of the District Court and the evidence, it is manifestly clear that the apparatus disclosed in the Lane patent in suit does not produce a new result or an improved result, nor does it produce and old result in a more economical and facile manner, and therefore its production did not rise to the dignity of patentable invention and the patent is therefore invalid.

8. That it is clear from the evidence (R. 356-357) and from the patent in suit itself (R. 480-483) that the claims of the patent in suit are so broad and ambiguous as to bar anyone from using (a) a gun perforator and a packer connected together (claims 7 and 12 of Lane patent), (b) a gun perforator and a formation tester (having the usual packer) connected together (Lane claims 8, 9, 11, 12, 13 and 14) regardless of the construction and mode of operation of said devices, and that such claims are therefore totally invalid as being functional, ambiguous, indefinite and failing to comply with R. S. § 4888.

A BRIEF HISTORICAL OUTLINE OF THE ART AND THE PATENT IN SUIT.

Prior to the patent in suit well testers were provided which were lowered into a well and were operative to take a sample of the fluid in the well.¹ Also, at that time gun perforators were provided which were capable of being lowered into a well bore to shoot holes in the casing to let in native fluid from the formation so it could be sampled.² It was and still is the practice of first lowering a gun perforator into the well and perforating the casing, and thereafter lowering the well tester into the well and taking a sample of the fluid in the well.^{3 & 4}

¹Finding of Faet 14 and R. 101-104.

²Finding of Faet 16 and R. 169.

³Testimony of witness Johnston, R. 117.

⁴Prior art patents disclosing packers for dividing a well bore into an upper and lower zone are shown in the exhibits and discussed by the witness O'Neill in the record as follows:

Ex. 17A (R. 521), R. 275-277; Ex. 17B (R. 521), R. 277-278; Ex. 17D (R. 533), R. 285-286; Ex. 17E (R. 539), R. 286-287; Ex. 17F (R. 543), R. 287; Ex. 17G (R. 548), R. 291-292; Ex. 17H (R. 553), R. 289-290; Ex. 17I (R. 559), R. 290; Ex. 17J (R. 565), R. 291-292; Ex. 17K (R. 570), R. 293-294; Ex. 17L (R. 574), R. 294-295; Ex. 17N (R. 586), R. 298; Ex. 17O (R. 594), R. 299-301; Ex. 17P (R. 600), R. 301; Ex. 17Q (R. 607), R. 303; Ex. 17R (R. 613), R. 309; Ex. 17S (R. 617), R. 304-306; Ex. 17U (R. 632), R. 306-307; Ex. 17V (R. 641), R. 307.

Prior art patents disclosing well testers and discussed by the witness O'Neill are in the record as follows:

Ex. 17B (R. 521), R. 278-280; Ex. 17C (R. 529), R. 283-285; Ex. 17E (R. 539), R. 286-287; Ex. 17F (R. 534), R. 287; Ex. 17G (R. 548), R. 291-292; Ex. 17H (R. 553), R. 289-290; Ex. 17I (R. 559), R. 290; Ex. 17J (R. 565), R. 291-292; Ex. 17L (R. 574), R. 294-295; Ex. 17N (R. 586), R. 298; Ex. 17O (R. 594), R. 299-301; Ex. 17P (R. 600), R. 301; Ex. 17Q (R. 607), R. 301-303; Ex. 17S (R. 617), R. 304-306; Ex. 17U (R. 632), R. 306-307; Ex. 17V (R. 641), R. 307, and Ex. 17W (R. 646), R. 307-308.

Prior art patents disclosing casing perforating guns are shown in the exhibits and discussed by the witness O'Neill in the record as follows:

Ex. 17G (R. 548), R. 288-289; Ex. 17M (R. 581), R. 295-298; Ex. 17T (R. 624), R. 309.

At the time of the alleged "invention" of the patent in suit, the commercial use of both of these devices was relatively new, and the evidence will show that the appellee, Lane-Wells Company, had obtained control of the basic patent* in the gun perforating art and were commencing to commercialize such gun. (R. 274, 359 and 670.) The evidence and the findings of fact of the District Court will show that at that time the appellee Lane-Wells seeing the commercial possibilities of the gun, adopted a policy of attempting to patent the use of such gun and every application by which it could be used, to completely monopolize the same. This led to the birth of the alleged "invention" in suit, which in effect was the concept of the abstract idea of connecting a tester and a perforator gun together so that they could both be lowered into the well at the same time and successively operated, and then removed together. This, it was believed, would save some of the time normally used in operating the two devices. (R. 116.) Although the conception of this idea of this patent was in the year 1932, no combined perforator and tester appeared until appellant Johnston produced the accused apparatus in 1943. This despite the fact that the patent owner, appellee Lane-Wells had been during that time continuously in the business of gun perforating well casings on a large scale. (R. 374-375.) As a matter of fact, no device con-

*Mims' patent Ex. 17G, R. 548 claim No. of which is as follows:

2. A method of perforating a well casing in place in a well hole, which comprises lowering an explosive charge down the well casing, exploding the charge, and directing the force of the charge in the direction of the well casing and thereby perforating the same.

structed and operating as shown and described in the patent in suit has, according to the evidence and the findings of fact, ever been produced. (R. 57, 379.)

Appellant Johnston, after the expiration of appellee Lane-Wells' Mims patent (which appeared to control the idea of perforating casing by shooting holes in it),* produced the accused device by screwing together its well tester, which it and its predecessors had used continuously since prior to the patent in suit (R. 101-105), with a perforating gun which had been invented by one Collins. (R. 113-114.) Appellant Johnston separately operated these tools and still separately operates them (R. 117), but likewise combines them by screwing them together to make up the accused apparatus.

The Court found as fact (Finding 55, R. 64) that the Johnston Tester is made in strict accordance with the Johnston patent Exhibit No. 17U (R. 632), and that the Johnston Perforator Gun, which is the other part of the accused apparatus, is made in accordance with the Collins patents Exhibits Nos. 11A, 11B and 11C. (R. 493, 505 and 514.)

The Court also found as fact that the construction and mode of operation of the accused apparatus entirely differs from the construction and mode of operation of the apparatus of the patent in suit (Finding 78, R 69)† so that the only manner in which appellee can contend that the accused apparatus violates the patent in suit is to contend that the inven-

*See footnote page 12.

†Such separate operation of the tools is not contended to be an infringement.

tion involved was the conception of the bare abstract "idea" of connecting together any type of well tester or sampler, whether old or new in the art, and any type of well perforating gun, whether old or new in the art.

A typical claim of the patent in suit is as follows:

"13. A gun type formation tester comprising: a gun means adapted to be lowered into a well bore and fire a projectile into the adjacent formation to form a fluid channel from the formation into the well bore; and means for entrapping for withdrawal fluid entering the well bore from said channel and having an intake port connectible with said channel, said gun means and entrapping means forming a tool entity adapted to be lowered as a unit into a well bore." (R. 483.)

THE ALLEGED "INVENTION" OF THE PATENT IN SUIT WAS ADMITTEDLY CONCEIVED SOLELY FOR THE PURPOSE OF MONOPOLIZING BY WAY OF A PATENT THE "USE" OF A GUN PERFORATOR.*

The District Court found as fact (R. 56):

"17. At the time of the invention disclosed in Lane patent No. 2,029,491, defendant had control of the dominating patent covering gun perforating devices for well casing, namely Mims patent No. 1,582,184, Exhibit 17-G.

18. The circumstance which gave rise to the alleged invention of the combined gun type formation tester shown in the Lane patent in suit was that after the inventor had demonstrated to oilmen that electrical control at the top of the well bore for firing the gun perforator was safe and feasible, *defendant desired to cover by means*

*Addressed to Specification of Errors 4 and 10.

of patents every possible application that the perforating gun might have and every means by which it might be operated."

The patentee Lane freely admitted in his testimony that the so-called "invention" was not made to solve any existing problem or to advance any science, but admittedly to aid him and his associates in creating a monopoly by way of patents on "every possible application that the gun might have, every application that it might have and every means by which it might be operated." The testimony is as follows (R. 371):

"Q. Do you recall any circumstances that gave rise to your inventing this combined gun type formation tester that is shown in this patent which I have shown to you?

A. At the time that the gun itself was being developed, and after I had demonstrated to a bunch of oil men that electrical control at the top of the hole was safe and feasible, it was the thought down at Lane-Wells that we ought to tie up—you know what I mean by that, in patent terms—every possible application that the gun might have, every application that it might have and every means by which it might be operated.

Q. In other words, you mean by 'tie up,' to make a monopoly by means of patents?

A. Well, I don't like the word 'monopoly,' but, for the want of a better word, yes.

Q. In other words, to try to cover it by patent?

A. Yes, to protect ourselves as completely as possible.

Q. And so that gave rise to this invention that is disclosed in the Lane patent that you have been referring to?

A. That is right."

Such patenting of the “use” of a perforator gun (as distinguished from a gun of a new construction and mode of operation) is repugnant not only to the constitutional provision pertaining to patents but is also repugnant to the long line of authorities which provide that the use of a device, regardless of whether such use is new or old, is unpatentable.

“It has long been settled that a mere use or function is not the subject of a patent, * * * *Roberts v. Ryer*, 91 U.S. 150, 157; *Goshen Sweeper Co. v. Bissell Carpet Sweeper Co.*, 37 U.S. App. 555, 19 C.C.A. 13, and 72 Fed. 67, and cases there cited. It would seem to follow as a corollary to these two propositions that, where it requires substantially no change in the old device to adapt it to the new use, such adaptation can not be the subject of a patent, no matter how remote and unthought of the new use may be, * * *.”

F. R. Stearns Co. v. Russell, 85 Fed. 218, 226 (C.C.A. 6th, 1898).

“It is settled by many decisions of this Court, which it is unnecessary to quote from or refer to in detail, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated. *Hotchkiss v. Greenwood*, 11 How. 248; *Phillips v. Page*, 24 How. 164, 167; *Jones v. Morehead*, 1 Wall. 155, overruling *S. C. nom. Livingston v. Jones*, 1 Fisher Pat. Cas. 521; *Hicks v. Gelsey*, 18 Wall. 670; *Smith v. Nichols*, 21 Wall. 112; *Brown v. Piper*, 91 U.S. 37; *Roberts v. Ryer*, 91 U.S. 150;

Keystone Bridge Company v. Phoenix Iron Company, 95 U.S. 274, 276; Planing Machine Company v. Keith, 101 U.S. 479, 491; Pearce v. Mulford, 102 U.S. 112; Heald v. Rice, 104 U.S. 737, 754-756; Atlantic Works v. Brady, 107 U.S. 192.”

Pennsylvania R. R. v. Locomotive Co., 110 U.S. 490, 493, 494 (1884), 28 L.E. 222, 4 S.C. 220; 1884 C.D. 168, 270 O.G. 207.

THE “CONCEPTION” OF AN ABSTRACT “IDEA” IS UNPATENTABLE. THE INVENTION IF ANY MUST BE FOUND IN THE APPARATUS FOR CARRYING THE ABSTRACT IDEA INTO EFFECT. IF THOSE SKILLED IN THE ART CAN PRODUCE THE APPARATUS AFTER DISCLOSURE OF THE BARE “IDEA”, NO PATENTABLE INVENTION HAS BEEN MADE.*

The contention of appellee, Lane-Wells, and one of the real issues here is whether or not the conception of the bare abstract “idea” of merely connecting two old separate tools (a perforator gun and a tester or sample receiver), together rises to the dignity of patentable invention and entitles the patent holder to a monopoly on simply connecting together any type of perforator gun and any type of well tester whether new or old and regardless of their construction or mode of operation.

To sustain the validity of the Lane patent in suit, it seems clear that this Court must decide that the conception of such an abstract “idea” entirely dissociated from any specific apparatus is patentable. This becomes manifest when the contended scope of

*Addressed to Specification of Errors 1-4-7 and 10.

the Lane patent in suit is measured by the yardstick of the appellant's acts contended to violate that patent, and is further emphasized by the character of the claims of the patent in suit, of which claim 13 is typical and reads as follows:

13. A gun type formation tester comprising: a gun means adapted to be lowered into a well bore and fire a projectile into the adjacent formation to form a fluid channel from the formation into the well bore; and means for entrapping for withdrawal fluid entering the well bore from said channel and having an intake port connectible with said channel, said gun means and entrapping means forming a tool entity adapted to be lowered as a unit into a well bore. (R. 483.)

Note that this patent claim includes only two elements (defined only by their function) forming a tool entity (connected together) (a) gun means of any kind or character to perforate a well casing, (b) sampling and trapping means of any kind and character. Clearly, therefore, the claimed "invention" is the conception of the bare abstract "idea" of connecting a perforator gun of any type or class to a formation tester of any type or class.

We contend that conception of such a bare abstract "idea" is not patentable under the authorities. Particularly is this true when, as here, as the Court found as fact:

(a) the two old elements which are so connected together separately perform their same old functions in the same old way as they did when used separately. The Court's findings (R. 66-67) are:

“63. The Johnston Formation Tester, which forms a part of the accused apparatus, is capable of, has been, and is now used separately from any other apparatus to test the formation penetrated by well bores by sampling the same.

64. The Johnston Perforating Gun, which is used as a part of the accused apparatus, is also capable of and is used separately from a testing tool or formation tester to perforate well casings in place in a well bore.

65. No structural modification was necessary, either in the Johnston Formation Tester or the Johnston Perforator Gun, in order to connect them together to form the accused apparatus.

66. When the Johnston Formation Tester and the Johnston Perforator Gun are connected together and lowered in a well bore for operation, they are each separately operated to perform exactly the same function in the same manner that they perform when run into a well bore separately.

* * * * *

68. When a perforating gun is connected to the lower end of a formation tester or sample receiver to be run into a well bore or well casing simultaneously, the operation of the gun does not change or modify the operation of the formation tester or sample receiver, and the operation of the formation tester or sample receiver does not change or modify the operation of the perforating gun.

69. When a perforating gun is connected to the lower end of a formation tester or sample receiver to be run into a well bore or well cas-

ing simultaneously, each device separately operates in its old accustomed manner, and there is no change in the operation of either, save and except the length of the time interval between the operation of the two devices.”

(b) no physical change in construction or change in mode of operation of the two devices is necessary to effect the connecting of the two tools together (as the Court also found as fact). (R. 66):

“65. No structural modification was necessary, either in the Johnston Formation Tester or the Johnston Perforator Gun, in order to connect them together to form the accused apparatus.

* * * * *

67. In the use of the accused apparatus, the Johnston Perforating Gun is screwed to the bottom of the Johnston Formation Tester and the two are lowered into the well bore simultaneously, and upon reaching the point of testing, the Johnston Perforator Gun is operated and fired in precisely the same manner that it is operated and fired when it is run into a well casing for perforating without a Johnston Formation Tester; and after firing the accused apparatus is elevated in the well bore and then the packer of the Johnston Formation Tester is set and the Johnston Formation Tester in all respects is operated precisely as it is operated when it is run into a well bore for making a test without the Johnston Perforator Gun connected therewith.”*

*Findings of Fact 63 to 66 and 69 are established by the uncontradicted testimony of the witness Johnston at R. 118-120 and Findings of Fact 67 and 68 are established by the uncontradicted testimony of the witness O'Neill at R. 267-269.

That the conception of such an abstract idea is unpatentable is clear from the following authorities:

This Court so ruled (1933) in *Killefer Mfg. Co. v. Dinuba Associates, Ltd.*, 67 Fed. (2d) 362, at 366:

“Claim 1 of the Petzoldt patent, broadly construed as applying to all power lifting farm machinery, is merely an idea. The idea thus sought to be monopolized is that of incorporating into any earth-working implements a lifting device wherein the lifting power will be applied through a pawl temporarily hooked over a pin in a wheel attached to the traction wheel of the implement (which pin corresponds mechanically to the tooth of a ratchet wheel) in such a manner that the following pin (corresponding to another tooth of a ratchet wheel) will release the pawl. * * * *The idea dissociated from a definite design and description of a machine is not patentable.*”

This Court recently reaffirmed this doctrine (1945) in *R. G. Le Tourneau, Inc. v. Gar Wood Industries, Inc.*, 151 Fed. (2d) 432, at 435:

“Appellant repeatedly refers to its five basic concepts and insists that the conception of an abstract idea is an act of invention where the abstract idea involves the combination of old instrumentalities for a new result, where the conception of the idea is not within the scope of the ordinary workman skilled in the art, and where the idea has been incorporated into a useful machine. Appellant’s theory is not entirely accurate, for when as here a result is not different in nature from results achieved by similar means in the past, invention must be embodied in the means for carrying the abstract

idea into effect, not merely in the conception of the idea. *Knapp v. Morse*, 1893, 150 U. S. 221, 228, 14 S.Ct. 81, 37 L. Ed. 1059; *Wollensak v. Sargent*, 1894, 151 U. S. 221, 227, 14 S.Ct. 291, 38 L. Ed. 137; *Cuno Engineering Corporation v. Automatic Devices Corporation*, 1941, 314 U. S. 84, 90-92, 62 S.Ct. 37, 86 L. Ed. 58; *Page Steel & Wire Co. v. Smith Bros. Hardware Co.*, 6 Cir., 1933, 64 F. 2d 512, 514; *Cleveland Punch & Shear Works Co. v. E. W. Bliss Co.*, 6 Cir., 1944, 145 F. 2d 991, 994.”

As early as 1893 our Supreme Court so ruled in *Knapp v. Morse*, 150 U. S. 221, 14 S. Ct. 81, at 83:

“The use and purpose sought to be accomplished by the Hall patent was the radial expansion of the dress form, *but it is well settled by the authorities that the end or purpose sought to be accomplished by the device is not the subject of a patent. The invention covered thereby must consist of new and useful means of obtaining that end. In other words, the subject of a patent is the device or mechanical means by which the desired result is to be secured.* *Carver v. Hyde*, 16 Pet. 519; *Le Roy v. Tatham*, 14 How. 156; *Corning v. Burden*, 15 How. 252; *Burr v. Duryee*, 1 Wall. 531; *Fuller v. Yentzer*, 94 U. S. 299.”

No invention is involved if one skilled in the art can readily produce the apparatus by mere mechanical skill once the “idea” is disclosed.

In *Wirebounds Patents Co. v. H. R. Gibbons Box Co.* (C.C.A.), 25 F. (2d) 363, 365, the Court said:

“It cannot be considered invention to describe and claim a process, or to produce a machine, or formulate a method which any successful mechanic would produce when required to effectuate a given result.”

See

Lyman Mfg. Co. v. Bassick Mfg. Co. (C.C.A.),
18 F. (2d) 29, 34;

Galvin Electric Mfg. Co. v. Emerson Electric Mfg. Co. (C.C.A.), 19 F. (2d) 885.

The Court of Appeals for the Eighth Circuit quoted the *Wirebounds* case as above with approval in *Tropic-Aire v. Sears, Roebuck & Co.*, 44 Fed. (2d) 580, at 591.

The Supreme Court (1941) in *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U. S. 84, 62 S. Ct. 37, clearly so ruled:

“To incorporate such a thermostatic control in a so-called ‘wireless’ or ‘cordless’ lighter was not to make an ‘invention’ or ‘discovery’ within the meaning of the patent laws. * * * *More must be done than to utilize the skill of the art in bringing old tools into new combinations.* (Citing cases.)

* * * * *

We may concede that the functions performed by Mead’s combination were new and useful. But that does not necessarily make the device patentable. Under the statute, 35 U.S.C. § 31, 35 U.S.C.A. § 31, R. S. § 4886, the device must not only be ‘new and useful’, it must also be an ‘invention’ or ‘discovery’. *Thompson v. Boisselier*, 114 U.S. 1, 11, 5 S. Ct. 1042, 1047, 29 L.Ed.

76. Since *Hotchkiss v. Greenwood*, 11 How. 248, 267, 13 L.Ed. 683, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art. (Citing cases.)”

On this same point the Circuit Court of Appeals for the Eighth Circuit in *Aro Equipment Corporation v. Herring-Wissler Co.* (1936), 84 Fed. (2d) 619, at 622, held:

“This court, in the case of *Tropic-Aire, Inc. v. Sears, Roebuck & Co.*, 44 F. (2d) 580, has reviewed many of the cases and laid down certain principles in regard to invention and patents which are binding in this circuit. Among them are the following:

‘New thoughts, merely involving working out of mechanical skill to produce result, are not patentable.’ ”

We urge, therefore, that the patent in suit is devoid of patentable invention and is invalid.

IN THE ACCUSED APPARATUS THE GUN PERFORATOR SEPARATELY PERFORMS ITS SAME OLD FUNCTION IN ITS SAME OLD MANNER AND THE FORMATION TESTER SEPARATELY PERFORMS ITS SAME OLD FUNCTION IN ITS SAME OLD MANNER. THE SEPARATE FUNCTIONING OF THE GUN DOES NOT MODIFY OR CHANGE THE FUNCTIONING OF THE FORMATION TESTER AND THE SEPARATE FUNCTIONING OF THE FORMATION TESTER DOES NOT CHANGE OR MODIFY THE FUNCTIONING OF THE GUN, AND THEY DO NOT CONTRIBUTE TO ANY JOINT FUNCTION, THEREFORE, A PATENT OR CLAIM THEREOF WHICH INCLUDES THE ACCUSED APPARATUS IS FOR AN UNPATENTABLE AGGREGATION AND IS TOTALLY INVALID.*

The patent, as measured by the yardstick of the accused apparatus, which appellee, Lane-Wells, contends is the equivalent of the patent disclosure, is for an unpatentable aggregation and is therefore invalid. All that is done in the accused apparatus is to connect two old devices in juxtaposition and letting each device function in its old manner to accomplish only its old result unmodified by the other device to which it is connected. The Court so found as fact (R. 64, 67-68):

“57. The accused apparatus is an instrumentality made up of a standard Johnston Formation Tester and a standard Johnston Perforator Gun screwed to the lower end of the Johnston Formation Tester.

* * * * *

65. No structural modification was necessary, either in the Johnston Formation Tester or the Johnston Perforator Gun, in order to connect them together to form the accused apparatus.

*Addressed to Specification of Errors 1-4-6-8 and 9.

66. When the Johnston Formation Tester and the Johnston Perforator Gun are connected together and lowered in a well bore for operation, they are each separately operated to perform exactly the same function in the same manner that they perform when run into a well bore separately.

67. In the use of the accused apparatus, the Johnston Perforating Gun is screwed to the bottom of the Johnston Formation Tester and the two are lowered into the well bore simultaneously, and upon reaching the point of testing, the Johnston Perforator Gun is operated and fired in precisely the same manner that it is operated and fired when it is run into a well casing for perforating without a Johnston Formation Tester; and after firing the accused apparatus is elevated in the well bore and then the packer of the Johnston Formation Tester is set and the Johnston Formation Tester in all respects is operated precisely as it is operated when it is run into a well bore for making a test without the Johnston Perforator Gun connected therewith.

68. When a perforating gun is connected to the lower end of a formation tester or sample receiver to be run into a well bore or well casing simultaneously, the operation of the gun does not change or modify the operation of the formation tester or sample receiver, and the operation of the formation tester or sample receiver does not change or modify the operation of the perforating gun.

69. When a perforating gun is connected to the lower end of a formation tester or sample

receiver to be run into a well bore or well casing simultaneously, each device separately operates in its old accustomed manner, and there is no change in the operation of either, save and except the length of the time interval between the operation of the two devices.”

In that state of fact, under the authorities, the patent in suit purporting to cover such an aggregation is invalid as not being for a patentable invention, but for a mere aggregation.

Our Supreme Court has so uniformly ruled:

William Hailes and John G. Treadwell, Admrs. of Ellen Treadwell, Deceased v. Jasper Van Wormer, et al., 87 U. S. 241, 20 Wall. 353, 375 (1874).

“* * * No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, * * *”

J. Reckendorfer v. Eberhard Faber, 92 U. S. 347, 2 Otto 347, 358 (1876).

“These patents relate to the manufacture of combined pencils and erasers.

* * * * *

It may be more convenient to have the two instruments on one rod than on two. *There may be a security against the absence of the tools of an artist or mechanic from the fact, that, the greater the number, the greater the danger of*

*loss. It may be more convenient to turn over the different ends of the same stick, than to lay down one stick and take up another. This, however, is not invention within the patent law, as the authorities cited fully show. There is no relation between the instruments in the performance of their several functions, and no reciprocal action, no parts used in common. * * **

Arthur Pickering, Charles H. Vickery, Henry D. Atwood, Exr. of Chas. H. Atwood, Deceased, and the Phoenix Manufacturing Company v. Michael McCullough, Jr., et al., Partners, as McCullough, Dalzell & Co., 104 U.S. 310, 14 Otto 310-319 (1881).

“ * * In a patentable combination of old elements, all the constituents must so enter into it, as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seized each of every part, per my et per tout, and not mere tenants in common, with separate interests and estates. * * **”

Stephenson v. Brooklyn Cross-Town R. Co., 114 U.S. 149, 5 S. Ct. 777 (1885).

“ * * We are of opinion that the alleged combination of these three elements, as described in this patent, is not patentable. There is, in fact, no combination, but a mere aggregation of separate devices, each of which performs the function for which, when used separately, it was adapted, and does not contribute to any new result, the product of their joint use. * * * There is, therefore, no patentable combination.”*

Brinkerhoff et al. v. Aloe, 146 U.S. 515, 13 S. Ct. 221 (1892).

“ * * * If several old devices are so put together as to produce even a better machine or instrument than was formerly in use, but each of the old devices does what it had formerly done in the instrument or machine from which it was borrowed, and in the old way, *without uniting with other old devices to perform any joint function, it seems that the combination is not patentable.* Hailes v. Van Wormer, *supra* (20 Wall. 353); Reckendorfer v. Faber, 92 U.S. 357. * * * ”

Richards v. Chase Elevator Co. et al., 158 U.S. 299, 15 S. Ct. 831 (1895).

“ * * * So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements. * * * ”

Grinnell Washing Mach. Co. v. E. E. Johnson Co., 247 U.S. 426, 38 S. Ct. 546 (1918).

“Confessedly all the elements of the Phillips patent are old. * * * These things, the simultaneous washing and wringing, with the operation of the control handle, for the purposes stated, embrace the advances alleged to have been accomplished upon the prior art. * * * The question is, does this bringing together of old elements accomplishing the purposes stated amount to that combination which is invention within the meaning of the patent law;

* * * * *

Applying the rule thus authoritatively settled by this Court, we think no invention is shown in

assembling these old elements for the purposes declared. No new function is 'evolved from this combination'; the new result, so far as one is achieved, is only that which arises from the well-known operation of each one of the elements."

Cuno Engineering Corporation v. Automatic Devices Corporation, No. 37, 314 U.S. 84, 62 S. Ct. Rep. 37 (1941), mandate amended 314 U.S. 587, 62 S. Ct. 476.

"We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. * * *

Tested by that principle Mead's device was not patentable. We cannot conclude that his skill in making this contribution reached the level of inventive genius which the Constitution, Art. I, Sec. 8, authorizes Congress to reward. He merely incorporated the well-known thermostat into the old 'wireless' lighter to produce a more efficient, useful and convenient article. * * * "

This Court of Appeals has uniformly followed the rule above enunciated.

Ray et al. v. Bunting Iron Works, 4 Fed. (2d) 214 (1925).

" * * * The use of electric motors to propel machinery; the use of centrifugal atomizing cups to atomize fuel oil, and the use of centrifugal fans to create air currents, are all old in the art, and to assemble motor, fan, and cup on a single shaft is not invention. * * * "

Eagle et al. v. P. & C. Hand Forged Tool Co.,
74 Fed. (2d) 918 (1935 (C.C.A. 9)).

“It is not necessary that all of the elements of the claim be found in one prior patent. If they are all found in different prior patents and no new functional relationship arises from the combination, the claim cannot be sustained. *Keene v. New Idea Spreader Co.* (C.C.A.) 231 F. 701; see also *Keszthelyi v. Doheny Stone Drill Co.* (C.C.A.) 59 F. (2d) 3.

Dallas Machine & Locomotive Works Inc. v. Willamette-Hyster Co. et al., 112 Fed. (2d) 623 (1940) (C.C.A. 9).

“We believe, therefore, that the applicable rule is the one stated in *Lincoln Engineering Co. v. Stewart-Warner Corp.*, 303 U.S. 545, 58 S. Ct. 662, 82 L. Ed. 1008, that the ‘mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention.’ * * * ”

Fernandez v. Phillips et al., 136 Fed. (2d) 404 (1943) (C.C.A. 9).

“ * * * The combination claimed by Day is in effect the combination of such a fan with a standard refrigerator car. Old elements may be combined into patentable invention, but, ‘so long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements.’ (Citing cases) * * * ”

The Courts of the other circuits uniformly follow the same rule.

Clisby et al. v. Reese (C.C.A. 7), 88 Fed. 645 (1898).

“ * * * But the claim of the plaintiff to invention consists in combining these three things, to-wit, a broom-corn thresher, an exhaust fan on top of the case to take away the dust, and an elevator at the side to scoop the grain from the bin where it is deposited, and carry it away to a convenient place. There is nothing to show where in these three things operate jointly to produce anything which is the result of their united action. Each of these elements appear to operate separately to produce its own separate individual result, just as they might in connection with any other business where an exhaust fan was needed to draw away the air from a given space, and an elevator with endless belts and buckets to carry any given substance to another place or to a different level. * * * ”

American Chocolate Machinery Co. v. Helmsstetter (C.C.A.2), 142 Fed. 978 (1905).

“ * * * The distinction between a combination and an aggregation lies in the presence or absence of mutuality of action. To constitute a combination it is essential that there should be some joint operation performed by its elements, producing a result due to their joint and cooperating action, while in an aggregation there is a mere adding together of separate contributions, each operating independently of the other. (Citing cases.) ”

Moore et al. v. Saunders (C.C.A. 8), 247 Fed. 314 (1917).

“* * * No ingenuity was displayed in coupling an old feeding device with means for opening, moistening, and sealing, which was also old. To be sure the new assemblage accomplishes as an entirety more than either old element did in separate operation, and in a way the elements were, as was said below, ‘successively cooperative’. But the cooperation was like that of the successive changes of horses in a coach journey from London to Bath. Those out of London, their task done, dropped their burden at Maidenhead; others picked it up there, and carried it to Newbury; and so on to destination. There was, of course, a ‘successive cooperation’; but in the sense of the patent law a patentable combination of old elements mean more than that. * * *

There must be a coaction between them, and not a mere hitching up of separate contributions, each one of which continues independently to perform its customary function; otherwise, there is but a mechanical juxtaposition that is not patentable. In this import, plaintiff’s feeding device does not coact with his means of opening, moistening, and sealing the envelopes. Each continues to do its old work in the old way. * * *”

Lundie Engineering Co. v. Railroad Supply Co.
(C.C.A.7), 8 Fed. (2d) 995 (1925).

“* * * The elements are all old and well known in the art, and the only question is, Does the bringing together of these old elements in the manner and for the purposes stated amount to a

combination which involves invention, or does it show merely an aggregation of old elements performing their well-known functions? * * * There is no mutuality of action, no inter-action, no cooperation, between them. Each acts just as it did when used alone. The result comes, not from the coaction of the elements, but from collecting the three elements together. This is mere aggregation, and does not involve invention."

Sands Mfg. Co. v. Smith (C.C.A.6), 53 Fed. (2d) 459 (1931).

"* * * Although Smith thus evolved a unitary structure, he did no more than bring together two separate and distinct devices—(1) the ordinary pressure valve; and (2) the temperature valve or fusible plug of Ross.

* * * * *

There is no joint operation between the temperature plug and the pressure valve. They were not designed to co-act. * * * He may have produced a more attractive and salable device, but it was not invention."

Demo, Inc. et al. v. Doughnut Mach. Corporation, Joe-Lowe Corporation et al. v. Same (C.C.A.4), 62 Fed. (2d) 23 (1932).

"We come next to the contention that the machines of defendants infringe claims 7 and 58 of Bergner patent No. 1,492,541 because they employ a doughnut former in connection with the cooking machine. We understand that no contention is made that the use of the doughnut former alone would constitute an infringement

of the Bergner patent. The contention is that the use of the former in connection with the cooling machine, so geared as to deposit doughnuts at definite intervals in accordance with the capacity of the cooling machine, is protected by the patent. But this is mere aggregation. (Citing cases.) It did not constitute invention to equip a cooking machine with a previously known doughnut former. As to the synchronization of the two, this was a mere matter of mechanics, not beyond the powers of any skilled artisan. In so far, therefore, as the claims of Bergner patent No. 1,492,541 relate to the combination of the doughnut former with the cooking machine, they are void for lack of invention. * * *

Doughnut Mach. Corporation v. Joe-Lowe Corporation et al. (C.C.A.4), 67 Fed. (2d) 135, 71 Fed. (2d) 424 (1933).

“All that the patentee has done here is to bring together the auger feed, which, as we have already shown, was old in the art, and the circular disc cutter cooperating with a sleeve through which the plastic material is extruded, which was also old, being disclosed in the patents to Megson 573,432, Hueg 560,719, and Williams 778,295. The synchronization of the two was a mere matter of mechanics not beyond the power of any skilled artisan. * * *

Magnavox Co. Inc. v. Talking Sales Pictures, Inc. (C.C.A.7), 126 Fed. (2d) 669 (1942).

“* * * It is rather plain, we think, that the result is merely the total of the separate results produced by the various units prior to their as-

semblage by the patentee. No new or different result was achieved. The most that may be said in favor of the patentee is that he produced a result more efficiently and perhaps with less expense.”

Also so holding are the following:

- Atlantic Works v. Brady; Brady v. Atlantic Works*, 107 U.S. 192, 2 S. Ct. 225 (1883);
Thatcher Heating Co. and Others v. Burtis and Another, 121 U.S. 286, 7 S. Ct. Rep. 1034 (1887);
Royer v. Roth et al., 10 S. Ct. 58, 132 U.S. 201 (1889);
Florsheim et al. v. Schilling, 137 U.S. 64, 11 S. Ct. 20 (1890);
Fond du Lac County v. May, 137 U.S. 395, 11 S. Ct. 98 (1890);
Busell Trimmer Co. et al. v. Stevens et al., 137 U.S. 423, 11 S. Ct. 150 (1890);
Union Edge Setter Co. v. Keith, 139 U.S. 530, 11 S. Ct. 621 (1891);
Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co., 174 U.S. 492, 19 S. Ct. 640 (1899);
Powers-Kennedy Contracting Corporation et al. v. Concrete Mixing & Conveying Co., v. R. C. Storrie & Co., 282 U. S. 175, 51 S. Ct. 95 (1930);
Paramount Publix Corporation v. American Tri-Ergon Corporation, 294 U. S. 464, 55 S. Ct. 449 (1935);

- Toledo Pressed Steel Co. v. Standard Parts, Inc., Same v. Huebner Supply Co., Montgomery Ward & Co., Inc. v. Toledo Pressed Steel Co.*, 307 U. S. 350, 59 S. Ct. 897 (1939);
- Mettler v. Peabody Engineering Corporation et al.*, 77 Fed. (2d) 56 (1935) (C.C.A. 9);
- Nye & Nissen v. Kasser Egg Process Co.*, 96 Fed. (2d) 420 (1938) (C.C.A. 9);
- Ashton Valve Co. v. Coale Muffler & Safety Valve Co. et al.* (C.C.A. 4), 52 Fed. 314 (1892);
- General Electric Co. v. Yost Electric Mfg. Co. et al.* (C.C.A. 2), 139 Fed. 568 (1905);
- Dodge Coal Storage Co. v. New York Cent. & H. R. R. Co.* (C.C.A. 2), 150 Fed. 738 (1907);
- Anton v. Grier Bros. Co.* (C.C.A. 3), 185 Fed. 796 (1911);
- Condit Electrical Mfg. Co. v. Westinghouse Elec. & Mfg. Co.* (C.C.A. 1), 200 Fed. 144 (1912);
- Gas Machinery Co. v. United Gas Improvement Co.* (C.C.A. 6), 228 Fed. 684 (1915);
- Turner v. Lauter Piano Co. et al.* (C.C.A. 3), 248 Fed. 930 (1918);
- Firestone Tire & Rubber Co. v. Seiberling* (C.C.A. 6), 257 Fed. 74 (1918);
- Universal Rim Co. v. Firestone Tire & Rubber Co. et al.* (C.C.A. 6), 7 Fed. (2d) 24 (1925);
- Angier et al. v. Nehring Electrical Works* (C.C. A. 7), 45 Fed. (2d) 354 (1930);

Jones-McLaughlin, Inc. v. Amerada Petroleum Corporation (C.C.A. 10), 47 Fed. (2d) 828 (1931);

Patent & Licensing Corporation v. Weaver-Wall Co. (C.C.A. 6), 95 Fed. (2d) 182 (1938);

Butex Gas Co. et al. v. Southern Steel Co. (C.C. A. 5), 123 Fed. (2d) 954 (1941).

We urge, therefore, that the Lane patent is invalid on the ground that it purports to cover a mere aggregation and not patentable combination.

THE ONLY EVIDENCE IS THAT IT REQUIRED ONLY MECHANICAL SKILL TO CONNECT AN OLD PERFORATOR GUN TO AN OLD FORMATION TESTER TO EFFECT THE UNION AND THEREFORE NO PATENTABLE INVENTION WAS INVOLVED.*

As is clear from the testimony of M. O. Johnston (R. 119-120) and Frank O'Neill (R. 267-269), no appreciable modification had to be made in the old patented testers and perforator guns to combine them into a combined perforator and tester, and that the prior art devices could obviously be connected together by mere mechanical skill.†

*Addressed to Specification of Errors 1 and 9.

†To illustrate that the assembly of two old prior art devices to meet the abstract "idea" alleged to be the "invention" of the patent in suit involved but simple mechanical skill, the Court is referred to the diagram on the following page, which except for the printed matter thereon is the same as Ex. 22, R. 655, and shows the formation tester of Simmons Patent No. 1,930,987 (Ex. 17-S, R. 617) combined with the well casing perforator gun of Mims Patent No. 1,582,184 (Ex. 17-G, R. 548), and the testimony of the witness O'Neill appearing at R. 310 to 317, and set forth in part

LANE PATENT NO. 2,029,491
CLAIM 13

A gun type formation tester comprising

(A) a gun means adapted to be lowered into a well bore and fire a projectile into the adjacent formation to form a fluid channel from the formation into the well bore

(B) and means for entrapping for withdrawal fluid entering the well bore from said channel and having an intake port connectible with said channel

(C) said gun means and entrapping means forming a tool entity adapted to be lowered as a unit into a well bore

B
Formation test
obtain and en
sample (Simn
Patent Ex. 17-8
617).

Packer

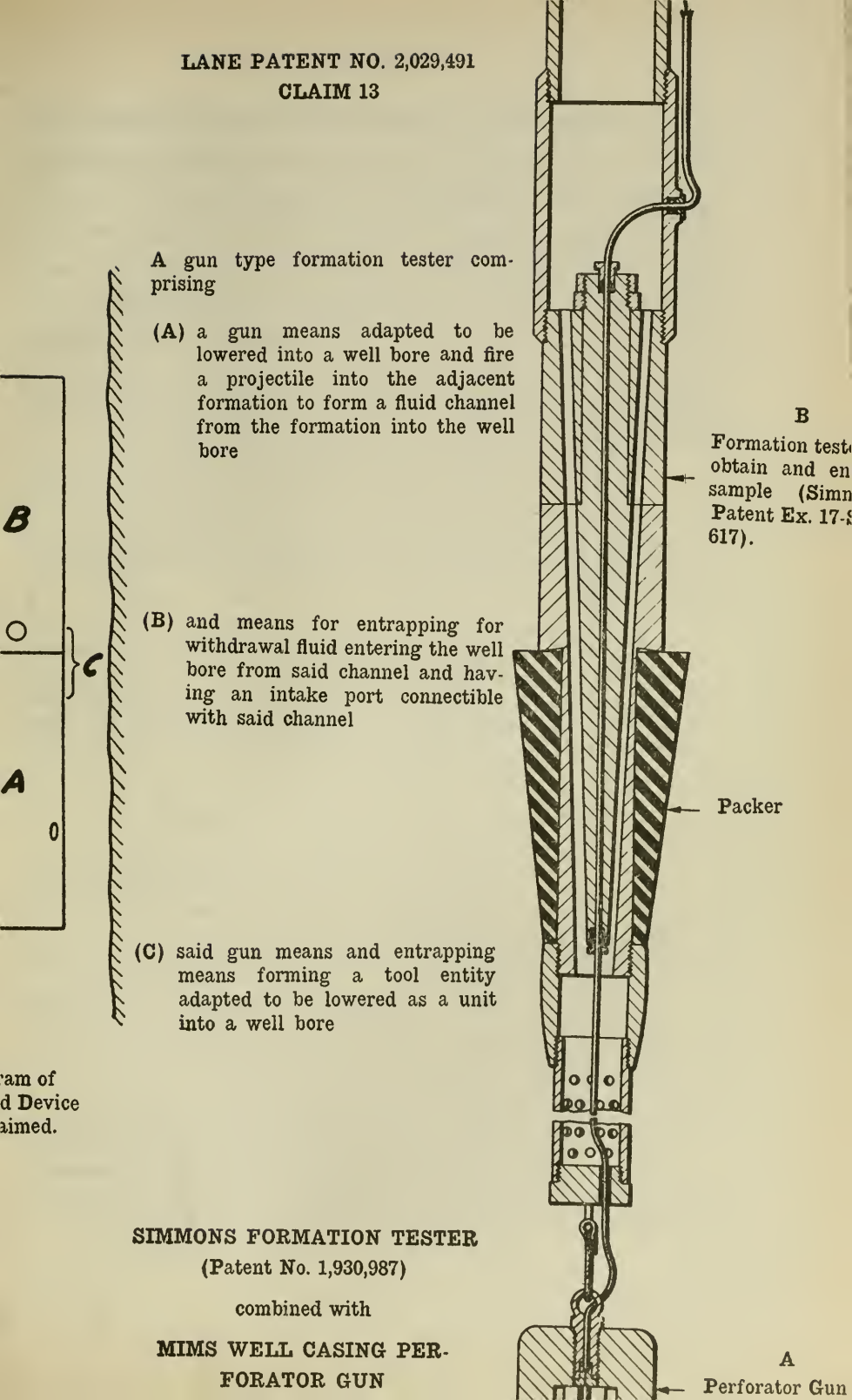
SIMMONS FORMATION TESTER
(Patent No. 1,930,987)

combined with

MIMS WELL CASING PER-
FORATOR GUN

A
Perforator Gun

ram of
d Device
aimed.



To combine the gun and tester in the accused apparatus, it was only necessary to screw them together. (R. 265.) No modification in construction or operation had to be made in either in order to combine them. Certainly, this is within the province of one skilled in the art and, therefore, the aggregation of these two elements into a single unit did not amount

hereinbelow, describing how the Simmons tester and Mims gun can be very simply connected to produce a gun type formation tester such as claimed in Lane Patent No. 2,029,491 (Ex. 1, R. 479) :

“Q. (by Mr. Mellin). Now, Mr. O’Neill, will you refer to the Mims Patent, No. 1,582,184, Exhibit 17-G for identification and to the Simmons Patent, 17-S for identification, and tell us whether or not you can assemble them or connect them together so that they can be run into a well bore at the same time for operation?

* * * * *

A. Yes, sir.

Q. (by Mr. Mellin). Will you tell us, please, the manner in which you would connect the two together so that they may be simultaneously run into a well bore and so that each could perform their separate duty, one of perforating and the other of testing the well? Did you make a drawing showing the manner in which you could connect them?

A. Yes, sir.

Q. And is this the drawing which I show you?

A. Yes, sir.

* * * * *

The Court. The small drawing has been marked Plaintiff’s Exhibit 22 for identification, and the large one will be marked Exhibit 23 for identification.

(The drawing referred to was marked as Plaintiff’s Exhibit 23, for identification.)

The Court. That is a drawing of the witness’ opinion as to how the Mims gun, depicted in 17-G, can be attached to the Simmons tester, Exhibit 17-S, is that correct?

The witness. Yes, sir, that is correct.

* * * * *

Q. (by Mr. Mellin). Just a moment, Mr. O’Neill. Does the drawing you made, except for the showing of a cable downwardly through the Simmons device and the changes necessary for that and the changes necessary to suspend the gun from it, conform to the drawings of the Simmons patent?

to patentable invention. On this point the Court found as follows (R. 64, 66):

"57. The accused apparatus is an instrumentality made up of a standard Johnston Formation Tester and a standard Johnston Perforator Gun screwed to the lower end of the Johnston Formation Tester.

58. It required only mechanical skill to perform the act of connecting the Johnston Formation Tester to the Johnston Perforating Gun to produce the accused apparatus.

* * * * *

65. No structural modification was necessary, either in the Johnston Formation Tester or the Johnston Perforator Gun, in order to connect them together to form the accused apparatus.

66. When the Johnston Formation Tester and the Johnston Perforator Gun are connected together and lowered in a well bore for operation,

A. Yes, sir.

Q. And does the drawing of the Mims gun at the bottom conform to the drawings of the Mims patent?

A. Yes, sir.

* * * * *

Q. Now, in your opinion, Mr. O'Neill, would a combination of the Simmons tester and the Mims gun be operative when assembled as you have shown, an operative structure?

A. Yes, it would be operative.

* * * * *

Q. Mr. O'Neill, with reference to the drawings, Plaintiff's Exhibits 22 and 23, for identification, showing the Mims gun combined with the Simmons tester, will you state whether or not there is any modification of the operation of the Simmons tester by such combination or connecting together?

A. None whatsoever, sir.

Q. And is the operation of the Mims gun modified or changed in any manner because of its connection with the Simmons tester?

A. Not at all, sir."

they are each separately operated to perform exactly the same function in the same manner that they perform when run into a well bore separately.”*

In this state of fact the claims of the patent in suit, which purport to include the accused apparatus within their scope, are invalid as totally lacking invention.

On this precise point see:

Wirebounds Patents Co. v. H. R. Gibbons Box Co. (C.C.A. 7) (1928), 25 Fed. (2d) 363, 365, in which the Court held:

“It cannot be considered invention to describe and claim a process, or to produce a machine, or formulate a method which any successful mechanic would produce when required to effectuate a given result.”

Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84, 62 S. Ct. 37 (1941):

“* * * More must be done than to utilize the skill of the art in bringing old tools into new combinations. (Citing cases.)

* * * * *

We may concede that the functions performed by Mead’s combination were new and useful. But that does not necessarily make the device patentable. Under the statute, 35 U.S.C. § 31, 35 U.S.C.A. § 31, R. S. § 4886, the device must not only be ‘new and useful’, it must also be an ‘invention’ or ‘discovery’. *Thompson v. Boisselier*,

*The above Findings are supported by the uncontradicted testimony of the witness O’Neill at R. 265-266 and the witness M. O. Johnston at R. 118-120.

114 U. S. 1, 11, 5 S.Ct. 1042, 1047, 29 L.Ed. 76. Since *Hotchkiss v. Greenwood*, 11 How. 248, 267, 13 L.Ed. 683, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art. (Citing cases.)”

The Circuit Court of Appeals for the Eighth Circuit in *Oro Equipment Corporation v. Herring-Wissler Co.* (1936), 84 Fed. (2d) 619, at 622, held:

“ ‘New thoughts, merely involving working out of mechanical skill to produce result, are not patentable.

Patent must be creation of inventive faculty and imagination, with something more than is obvious to persons skilled in the art.

Mere novelty and utility is not invention and cannot be substituted therefor.

Ingenuity does not constitute invention.’ ”

This Court of Appeals followed this rule in *Bailey v. Sears, Roebuck & Co.*, 115 Fed. (2d) 904:

“We conclude that the trial Court was correct in holding that a mechanic skilled in the art of radio condenser and cabinet construction, given the problem of measuring or determining the position of the rotors of the condenser by means of a clock faced dial, with two hands, one faster and one slower, already used in that art, would not require or exercise inventive genius in designing the patented device. Hence, such a mechanic cannot claim a patent monopoly and exclude other skilled mechanics from using the

same or equivalent devices. Hence, we hold that there was no invention in the patent under consideration.”

THE ONLY EVIDENCE AND THE FINDING OF FACT BY THE DISTRICT COURT IS THAT THE DEVICE SHOWN IN THE LANE PATENT IN SUIT WILL NOT WORK PRACTICALLY IN INDUSTRY WHEN CONSTRUCTED AND OPERATED ACCORDING TO THE SPECIFICATIONS AND DRAWINGS OF THE PATENT.*

The Court found as a fact (and the testimony (R. 243-248) to that effect is uncontradicted) that the apparatus of the Lane patent constructed and operated as illustrated and described in the patent is inoperative to obtain and bring to the surface of the well a beneficial test sample, and, consequently, would be inoperative and impractical in industry under normal and usual circumstances.

“34. Under normal and usual circumstances as described above in findings Nos. 25-30, the device of the Lane patent in suit, as disclosed therein, would be impractical in industry to recover and bring to the surface of the well a beneficial test sample, without the additional use of other auxiliary equipment or devices and operations not described or illustrated in the patent, and by a mode of operation not described or illustrated in the patent.” (R. 34.)

The reason that the device of the patent in suit is inoperative and impractical as illustrated and described in the patent is that the ball valve 28 (on the

*Addressed to Specification of Errors 1-11 and 13.

drawings of the patent and in the specification thereof) is intended to operate to prevent mud fluid from entering the tester when the packer of the tester is unseated. That ball valve 28 will not so function and consequently the amount of mud which will enter the patented device and its tubing, if it is attempted to elevate such sample to the surface, will be many times the amount of the sample taken into the device and manifestly render such sample useless for any practical purpose. In this regard, the Court found (R. 59):

“32. In the Lane patented device the ball valve 28 will not function to prevent mud fluid from entering the tester when the packer is unseated in normal use of a tester in the oil fields, as described above in Findings Nos. 25-30.

33. Under normal conditions, as described above in findings Nos. 25-30, the amount of mud fluid which will enter the Lane device and its tubing after releasing the packer will be many times the amount of the sample taken into the device and its tubing from the formation.*

34. Under normal and usual circumstances as described above in Findings Nos. 25-30, the device of the Lane patent in suit, as disclosed therein, would be impractical in industry to recover and bring to the surface of the well a beneficial test sample, without the additional use of other auxiliary equipment or devices and operations not described or illustrated in the patent, and by a mode

*The above Findings are supported by the uncontradicted testimony of the witness Barton at R. 364-367 and the witness O'Neill at R. 326-327, 332, 336-348.

of operation not described or illustrated in the patent.

35. The Lane patent in suit fails to disclose a device which is of any practical benefit to the oil industry, unless additional auxiliary devices or equipment not described or illustrated in the patent are used in connection therewith, to remove the sample from the device and elevate the sample to the surface of the well."

From these findings of fact, it is manifestly clear, and the evidence is uncontested and uncontradicted, that the apparatus disclosed in the patent will not by itself, constructed and operated as shown in the patent, be capable of producing at the surface of the well a sample which would be of any use at all. In this regard, see the testimony of the unbiased witness Barton, who testified (R. 362) that he was a petroleum engineer with a bachelor of science degree, and was employed by the State of California as senior oil and gas engineer for the last nineteen (19) years.

His testimony on the point that if the mud or well fluid can enter the tester following the path of the sample, as set forth in Findings of Fact Nos. 32 and 33 above set out, that such a tool would be of no practical benefit in testing a well. His testimony follows (R. 364, 365, 366):

"Q. Speaking of a Johnston tester without the gun, Mr. Barton, and assuming that in a tool of that character no means is provided to exclude the well fluid from entering the tool following the same path that the sample entered in the tool, so that the fluid in the tool and in its tubing always

equalized with the mud fluid in the well, in your opinion would or would not such a tool be of any practical benefit in testing a well for water shut-off?

* * * * *

The Witness. My answer to that would have to be no.

Q. (by Mr. Mellin). And would you state your reasons for your answer, Mr. Barton?

A. Well, in testing a water shutoff on a string of casing that has been cemented in the well, it is necessary to obtain a sample of fluid which comes into the drill pipe or tubing during the time the valve is open, and which is below the point at which the packer is set. If the fluid behind the drill pipe or tubing were allowed to be equalized after the packer was released, it would be impossible to identify the character of the fluid which entered during the time the valve was open.

Q. Have you finished your answer, Mr. Barton?

A. Yes.

Q. Now, in making a water shutoff test by a tester of the type of the Johnston formation tester, assuming that the packer is tight and set and the tool is open to take a sample, and thereafter the packer is released and the mud fluid in the well under the hydrostatic head has free access to flow into the tool following the taking of the test sample, and the fluid in the tool equalized with the mud fluid in the well bore, in your opinion would or would not such a test be of any practical benefit in determining whether or not a water shutoff had or had not been effected?

A. No."

Under the above state of fact, the patent is totally invalid and void as will be shown by the authorities herein later quoted for two reasons:

(a) because the device as shown and described in the patent will not function practically and is not useful.

(b) because the patent fails to illustrate and describe an operative and useful device.

The fact that the device of the patent in suit may be made to work to a limited degree by the additional use of auxiliary devices or equipment (not described or illustrated in the patent) operated in connection therewith to remove the sample from the device and elevate it to the surface of the well, cannot remedy the fatal defect of inoperativeness and impracticability of the device as shown and described in the patent.

The fact that the device will not work practically in industry when constructed according to the patent specifications is fatal to the patent and the latter is invalid as not being useful, and the patent cannot now be sustained upon a showing that it can be made to work if additional auxiliary devices not shown or described in the patent are added to the apparatus.

In the widely accepted modern authority on the point, *Besser v. Merrilat Gulvert Core Co.*, 243 Fed. 611, 612 (C.C.A. 8) (1917), it was held:

“If, however, it will not work practically in industry when constructed according to the claims and specifications, it is not useful, and cannot be sustained upon a showing that it can be made to

work by a small improvement. That is the objection to the suggestion of plaintiff here that if a wire be applied to his machine it can be made to work some. * * * Plaintiff had a new idea. It was valuable in industry. Unfortunately for him, however, an idea is not patentable. Only a machine is patentable, and when plaintiff undertook to embody his idea in a machine he did not give it an expression which would work in industry. His machine, therefore, was not patentable.

The defendant has met this difficulty by attaching a system of torsion springs to the plates, so as to produce and maintain the desired resiliency. This new element is fundamental to the structure, and defendant, by adding it, was the first to embody the invention in a workable and useful form."

If the apparatus of the patent will not accomplish the result without addition or subtraction to the apparatus disclosed, the patent is invalid.

The rule is clearly stated in *O'Reilly v. Morse* (Telegraph Case), 15 How. 62, 56 U.S. 62, 14 L. Ed. 601:

"The provisions of the Acts of Congress in relation to patents may be summed up in a few words.

Whoever discovers that a certain useful result will be produced, in any art, machine, manufacture or composition of matter, by the use of certain means, is entitled to a patent for it; *provided he specifies the means he uses in a manner so full and exact, that anyone skilled in the science to which it appertains, can, by using the means he*

specifies, without any addition to or subtraction from them, produce precisely the result he describes. And if this cannot be done by the means he describes, the patent is void."

Again our Supreme Court so ruled in *Mitchell v. Tilghman*, 86 U.S. 287, 19 Wall. 287, 22 L. Ed. 125:

"2. Grant all that, still it is insisted by the respondent that the result described in the specification and claim of the patent cannot be accomplished so as to be practically useful by the method and apparatus described in the specification.

Whoever discovers that a certain useful result will be produced in any art, machine, manufacture or composition of matter by the use of certain means is entitled to a patent for his invention, provided he specifies the means he uses * * *. *Such description must be correct, as it is settled law that the patent is void if the described result cannot be obtained by the described means. * * *"*

Again our Supreme Court so ruled in *Beidler v. United States*, 253 U.S. 447, 453 (1920), 40 S. Ct. 564:

"Ever since *Grant v. Raymond*, 6 Pet. 218, 247, it has been consistently held that a correct and adequate description or disclosure of a claimed discovery (which, in the case of a machine, involves particularly the operation of it) is essential to the validity of a patent, for the reason that such a disclosure is necessary in order to give the public the benefit of the invention after the patent shall expire. The source of the power to grant patents, and the consideration for granting

them, is the advantage which the public will derive from them, especially after the expiration of the patent monopoly, when the discoveries embodied in them shall become a part of the public stock of knowledge.

The application of these requirements of the law to our conclusion that *the only form of construction of the machine and the only method of operation of it which are disclosed in the patent would not produce a sufficiently uniform and rapid development of the film to render it useful*, must result in the approval of the judgment of the Court of Claims, *that the patent is invalid and void*, for the reason that it fails to disclose a practical and useful invention."

See also *Houston v. Brown Mfg. Co.*, 270 Fed. 445, at 448:

"Of course, if, as claimed, this purported invention added nothing to the knowledge of the cultivator art, and would not accomplish its purpose practically when applied in industry, or was so negligible in its nature as to be wholly immaterial in results, then it is necessarily invalid. *Coupe v. Royer*, 155 U.S. 565, 15 Sup. Ct. 199, 39 L.Ed. 263; *Besser v. Merrilat*, 243 Fed. 611, 612, 156 C.C.A. 309 (C.C.A. 8); *Scott v. Fisher Knitting Mach. Co.* (C.C.) 139 Fed. 137-146; *Carter Mach. Co. v. Hanes et al.* (C.C.) 70 Fed. 859."

The fact that the patented device must, in order to operate even to a limited extent, be further combined with addition of auxiliary devices cannot save the patent because such addition of new tools to the Lane patent apparatus and the giving such apparatus a new

mode of operation, in effect rewrites the patent and clearly renders the patent void as not satisfying the requirements of R.S. 4888, 35 U.S.C.A. § 33.

The Supreme Court in *Permutit Co. v. Graver Corporation*, 284 U.S. 52, 52 S.Ct. 53, said:

“* * * For even if a patent for a ‘free’ bed might have been valid, that sued on is invalid for lack of the disclosure prescribed in 5 Rev. St. § 4888. (35 U.S.C.A. § 33.) There is no mention in the specification of either a ‘free’ or a ‘locked’ zeolite bed; or of the alleged discovery that a rising space above the zeolite bed is necessary for the successful operation of the softener; or of the need of a device to prevent the lighter grains of zeolite from passing out in back-washing. * * * As the patentee has thus failed to give in the specification ‘a written description’ * * * the patent is void.”

In *Special Equipment Co. v. Ooms*, 153 Fed. (2d) 121, the United States Court of Appeals, District of Columbia, held:

“One of the fully established requirements of the patent law is that the applicant must disclose what he claims and how it works. ‘In case of a machine the description must disclose the best mode in which the inventor has contemplated the application of his discovery, R.S. §4888. (35 U.S.C.A. § 33.) Ever since *Grant v. Raymond*, 6 Pet. 218 (247), 8 L.Ed. 376, it has been consistently held that a correct and adequate description or disclosure of a claimed discovery (which, in the case of a machine, involves particularly the operation of it) is essential to the validity of a patent.’ * * *”

FROM THE FINDINGS OF FACT OF THE DISTRICT COURT IT IS CLEAR THAT THE APPARATUS DISCLOSED IN THE LANE PATENT IN SUIT DOES NOT PRODUCE (a) A NEW RESULT, (b) AN IMPROVED RESULT, NOR DOES IT PRODUCE AN OLD RESULT IN A MORE ECONOMICAL AND FACILE MANNER AND THEREFORE ITS PRODUCTION DOES NOT RISE TO THE DIGNITY OF PATENTABLE INVENTION.*

The advantage of the accused apparatus in assembling a perforator gun and a tester on one string of drill pipe (but such advantage is absent in the patented apparatus) is that by simultaneously running the perforator gun and tester, the time required to perforate and to take a test sample is less than the time ordinarily required to perform these two operations when running the perforator gun and the tester separately.

This is the only advantage in combining the gun perforator and the tester when making water shut-off tests in a well, which operation accounts for ninety-eight per cent (98%) of the use of the accused tool. The Court so found as a fact (R. 67-68):

“70. In making water shut-off tests in well casing, *there is no new or different result obtained by running the accused apparatus to perforate and make such a test over running a formation tester and a perforating gun separately* to make the test, *except a saving in time* required to perform the operations.

71. Approximately ninety-eight per cent (98%) of the use of the accused apparatus is de-

*Addressed to Specification of Errors 1-4-7-8 and 10.

voted to making water shut-off tests in well casing.'''*

However, *inasmuch as the apparatus of the patent in suit is incapable of elevating the sample to the surface* (and the Court so found as a fact—Finding No. 34 (R. 59)), bailers or some other tools must be employed in conjunction with the patented apparatus to run down into that tool while it is still in the well and remove the sample to the surface. Therefore, *in recovering a sample by the use of the apparatus illustrated and described in the patent in suit, there is no saving of time in recovering a sample.*

The Court so found as a fact (R. 60):

“37. If the Lane device were employed to make a test and separate instrumentalities, such as bailers, were required to remove the test sample from the device so that the sample may be brought to the surface, as much time would be required, under the conditions described above in findings Nos. 25-30, to make the test and recover such sample as would be required by the use of a separate perforating gun and formation tester.”

Therefore, in the above ninety-eight per cent (98%) of the field of use of the patented apparatus no advantage is produced by the patented device (in that no time is saved) over the prior method of running the tester and gun perforator separately, because, as

*The above Findings are supported by the uncontradicted testimony of the witness Johnston at R. 116-120 and 426.

above explained, and as found by the Court in findings Nos. 70, 71, 34 and 37,* the only advantage in running a combined perforator and tester in making water shut-off tests is the saving in time. In that by using the apparatus of the patent in suit no saving of time is effected over such separate running of the tester and perforator gun, not only is no new result produced by the patented apparatus, but no improved result is produced by the patented apparatus, and no old result is produced by the patented apparatus in a more facile or economical manner.

As above set forth water shut-off tests account for ninety-eight per cent (98%) of the field of use of com-

*“70. In making water shut-off tests in well casing, there is no new or different result obtained by running the accused apparatus to perforate and make such a test over running a formation tester and a perforating gun separately to make the test, except a saving in time required to perform the operations.

“71. Approximately ninety-eight per cent (98%) of the use of the accused apparatus is devoted to making water shut-off tests in well casing.”

* * * * *

“34. Under normal and usual circumstances as described above in findings Nos. 25-30, the device of the Lane patent in suit, as disclosed therein, would be impractical in industry to recover and bring to the surface of the well a beneficial test sample, without the additional use of other auxiliary equipment or devices and operations not described or illustrated in the patent, and by a mode of operation not described or illustrated in the patent.”

* * * * *

“37. If the Lane device were employed to make a test and separate instrumentalities, such as bailers, were required to remove the test sample from the device so that the sample may be brought to the surface, as much time would be required, under the conditions described above in findings Nos. 25-30, to make the test and recover such sample as would be required by the use of a separate perforating gun and formation tester.”

bined perforators and guns. The balance or two per cent (2%) of the field of use is in testing oil producing sands. The Court found as a fact that in such two per cent (2%) of use, the taking of a test immediately following perforation would result in obtaining a formation sample such as could not be obtained where a test is made in a matter of several hours after perforation. (Finding No. 42, R. 61.)

The reason that a different sample is obtained is that where a sample taken after an interval of hours between perforating and testing, there is an increase of one to five per cent in the amount of filtrate water taken into the tester with the sample. *The Court in its Finding of Fact No. 45 (R. 62), however, finds that normally such an additional amount of filtrate water would not have any disadvantageous effect as far as the efficiency of the test is concerned.* We quote Finding of Fact No. 45:

“45. When a sample of the native formation fluid is obtained in the tester, an increase of one to five per cent in the amount of filtrate water taken into the tester with said sample would not normally have any disadvantageous effect as far as the efficiency of the test is concerned, in determining the nature and characteristics of the native formation fluid.”

Therefore, even in the two per cent (2%) of use outside of the making of water shut-off tests, no improved result other than that of a trivial character is obtained by a combined gun and tester, and even in this use, the patented apparatus accomplishes no time

saving in making the test due to the fact that the sample must be bailed or in some fashion removed from the tester, as in a water test set out above.

Thus, we urge that this total lack of any improvement or advance over the prior art renders the apparatus of the patent in suit unpatentable as totally lacking invention and patentable utility. The Courts have uniformly refused to sustain such patents where the advance forward, if any, was insignificant or trivial.

Seymour v. Ford Motor Co., (C.C.A. 6—Nov. 5, 1930), 44 Fed. (2d) 306:

“Congress has defined the meaning of the term ‘invention’ as including ‘any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof. * * *’ 35 U.S. Code § 31. (35 U.S.C.A. § 31.)

* * * * *

The step forward, if any, was insignificant and trivial in the art, and without commercial acceptance or use, except as defendant’s device overstepped the line. * * * The change is rather of that trivial and commonplace character which bespeaks an absence of the faculty of invention, as in *Maceskid Service Chain Co. v. Perdue*, 1 F. (2d) 924 (C.C.A. 6); and the lack of prior uses of patent anticipation is due, we think, to the absence of a real need or problem to be solved. Compare, also, *Tolfree v. Wetzler*, 22 F. (2d) 214 (D.C.N.J.); *Carson Inv. Co. v. Anaconda Copper Mining Co.*, 17 F. (2d) 815, 824 (D.C. Mont.).”

The Supreme Court (1941) in *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 62 S.Ct. 37, clearly so ruled:

“To incorporate such a thermostatic control in a so-called ‘wireless’ or ‘cordless’ lighter was not to make an ‘invention’ or ‘discovery’ within the meaning of the patent laws. * * * More must be done than to utilize the skill of the art in bringing old tools into new combinations. (Citing cases.)

* * * * *

* * * Under the statute, 35 U.S.C. § 31, 35 U.S.C.A. § 31, R.S. § 4886, the device must not only be ‘new and useful’, it must also be an ‘invention’ or ‘discovery’. *Thompson v. Boisselier*, 114 U.S. 1, 11, 5 S.Ct. 1042, 1047, 29 L.Ed. 76. Since *Hotchkiss v. Greenwood*, 11 How. 248, 267, 13 L.Ed. 683, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art. (Citing cases.)”

On this same point the Circuit Court of Appeals for the Eight Circuit in *Oro Equipment Corporation v. Herring-Wissler Co.* (1936), 84 Fed. (2d) 619, at 622, held:

“‘Mere novelty and utility is not invention and cannot be substitute thereof.’”

This Court in *Keszthelyi v. Doheny Stone Drill Co. et al.*, 59 Fed. (2d) 3, at 8, said:

“In the case of *Klein v. City of Seattle*, 77 F. 200, 204, this court said:

“ * * * In the language of the supreme court:
“It is not enough that a thing shall be new, in the sense that, in the shape or form in which it is produced, it shall not have been before known, and that it shall be useful, but it must, under the constitution and statute, amount to an invention or discovery.” Hill v. Wooster, 132 U.S. 693, 701, 10 S.Ct. 228, 231 (33 L.Ed. 502), and authorities there cited.’ ”

See also:

Sandy MacGregor Co. et al. v. Vaco Grip Co.
 (C.C.A. 6) (December 11, 1924), 2 Fed. (2d)
 655.

Therefore, one must conclude from the Findings of Fact of the District Court that the apparatus illustrated and described in the patent *fails to accomplish a new result, fails to accomplish an improved result, and fails to accomplish an old result in a more economical or facile fashion*, and that for this reason its production did not rise to the dignity of an invention, and it does not have the usefulness required of a patentable invention by the statutes, and the patent is, therefore, totally invalid.

THE CLAIMS OF THE PATENT IN SUIT ARE SO BROAD AND AMBIGUOUS AS TO BAR ANYONE FROM USING (a) A GUN PERFORATOR AND A PACKER CONNECTED TOGETHER (CLAIMS NOS. 7 AND 12 OF LANE PATENT), (b) A GUN PERFORATOR AND A FORMATION TESTER (HAVING THE USUAL PACKER) CONNECTED TOGETHER (LANE CLAIMS NOS. 8, 9, 11, 13 AND 14), REGARDLESS OF THE CONSTRUCTION AND MODE OF OPERATION OF SAID DEVICES, AND ARE THEREFORE TOTALLY INVALID AS BEING FUNCTIONAL, AMBIGUOUS, INDEFINITE AND FAILING TO COMPLY WITH R. S. § 4888.*

For the convenience of the Court, we set out the claims of the Lane patent in suit hereafter and state to the Court that these claims are typical of the remaining claims in the patent not sued upon, and urge that they are totally and completely invalid because they are functional, ambiguous, indefinite and failing to comply with R. S. § 4888.*

*Addressed to Specification of Errors 11 and 12.

*Revised Statutes § 4888:

“Before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. * * *”

(The Claims)**(Our Comments)****Claim No. 7**

In combination

a packer adapted when set to divide a well casing into upper and lower zones

and a gun means suspended from said packer in said lower zone, said gun means arranged to drive a projectile through the surrounding well casing

packer defined solely by its function

the gun means is not defined by physical or operative characteristics but solely by its function

Claim No. 8

In combination

a packer adapted when set to divide a well casing into upper and lower zones

a gun means suspended from said packer in said lower zone; said gun means arranged to drive a projectile through the surrounding well casing

and a formation testing device for collecting a sample of well fluid admitted into the lower zone through the perforation made by said projectile

packer defined solely by its function

the gun means is not defined by physical or operative characteristics but solely by its function

the formation testing device is not defined by its physical or operative characteristics but solely by its function

Claim No. 9

A formation tester comprising

packer means providing a region sealed from the zones above and below said packer means

a gun unit disposed so as to fire a projectile from said region into the surrounding formation

packer defined solely by its function

the gun unit is not defined by physical or operative characteristics but solely by its function

(The Claims)**(Our Comments)**

and a receiving device arranged to receive fluid introduced into said region from the path made by said projectile

the receiving device is not defined by its physical or operative characteristics but solely by its function

Claim No. 11

A formation tester comprising

a gun unit adapted to be lowered into a well bore arranged to fire a projectile through a well casing into a surrounding formation

the gun unit is not defined by physical or operative characteristics but solely by its function

a sample receiving means having an inlet in proximity to said gun unit

the receiving means is not defined by its physical or operative characteristics but solely by its function

and packer means for minimizing the introduction of fluids into said sample receiving means from sources other than the avenue provided by said projectile

packer defined solely by its function

Claim No. 12

In combination

a packer for dividing a well bore into two zones

packer defined solely by its function

and gun means connected with the packer for firing a projectile into the formation surrounding the well bore to open one of said zones to flow of fluids from said formation along the path formed by said projectile

the gun means is not defined by physical or operative characteristics but solely by its function

Claim No. 13

A gun type formation tester comprising

(The Claims)**(Our Comments)**

a gun means adapted to be lowered into a well bore and fire a projectile into the adjacent formation to form a fluid channel from the formation into the well bore

the gun means is not defined by physical or operative characteristics but solely by its function

and means for entrapping for withdrawal fluid entering the well bore from said channel and having an intake port connectible with said channel

the "means" is defined solely by its function and not by any physical or operative characteristics

said gun means and entrapping means forming a tool entity adapted to be lowered as a unit into a well bore

no relative positioning or manner of forming them into a tool entity is defined

Claim No. 14**In combination**

a packer for dividing a well bore into two zones

packer defined solely by its function

gun means connected with the packer for firing a projectile into the formation surrounding the well bore to open one of said zones to flow of fluids from said formation along the path formed by said projectile

the gun means is not defined by physical or operative characteristics but solely by its function

and means for entrapping for withdrawal fluid entering the perforated zone and having an intake passage connectible with said fluid receiving zone

said "means" being defined entirely by its function and not by its physical or operative characteristics

said means adapted to be lowered with said packer and gun means and forming a tool entity therewith

no physical or structural characteristics or devices or modes of forming the three instruments into a tool entity or their relative positions or the interrelation therebetween is defined

The Court will note that these claims if construed literally would bar anyone from using in an oil well any device heretofore or hereafter invented which combines any type of gun perforator and any type of packer both old in the art, or which combines any type of well tester, gun perforator or packer.*

Claims of this character have been uniformly held invalid ever since 1853, commencing with the case of *O'Reilly v. Morse*, 15 How. 62, 112 (1853), 14 L.Ed. 601 (the telegraph case), in which our Supreme Court held:

*Appellee Lane-Wells baldly admits and the District Judge understood that the claims of the patent in suit "cover" any packer and any gun means. At R. 356-357 the following admissions were made:

"The Court: Perhaps we can save time on claim 7, Exhibit 1. Does the defendant claim it means any particular type of packer or does it mean any packer that will serve the purpose—any packer that will function as a packer?"

"Mr. Foster: Any packer that will function as a packer for the purposes described in the patent, yes, your Honor.

"The Court: There is no invention claimed in the packer itself?"

"Mr. Foster: No, sir.

(Testimony of Frank E. O'Neill.)

"The Court: Doesn't that meet the question?"

"Mr. Mellin: That would as to one element.

"The Court: As far as claim 7 is concerned.

"Mr. Mellin: Claim 7 goes on, your Honor:

'In combination; a packer adapter when set to divide a well casing into upper and lower zones; and a gun means suspended from said packer in said lower zone; said gun means arranged to drive a projectile through the surrounding well casing.'

"I should like to, and I think I am entitled to ask the witness whether or not that describes, that description of the gun means describes to him any particular gun means or all gun means capable of accomplishing that function.

"The Court: I will sustain the objection upon the ground it is clear to me. It does not describe any particular means. I do not need an expert on that.

"Mr. Mellin: All right, your Honor."

“He (Morse) claims the exclusive right to every improvement where the motive power is the electric or galvanic current, and the result is the marking or printing intelligible characters, signs, or letters at a distance. If this claim can be maintained, it matters not by what process or machinery the result is accomplished. For aught that we know, some future inventor, in the onward march of science, may discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any part of the process or combination set forth in the plaintiff’s specification * * *”

See also:

Risdon v. Medart, 158 U.S. 68, 77, 15 S.Ct. 745,
39 L.Ed. 899.

To the same end is the leading case of *General Electric Co. v. Wabash Appliance Corporation et al.*, 304 U.S. 364, 58 S.Ct. 899 (1938), in which the Court held:

“* * * But Congress requires, for the protection of the public, that the inventor set out a definite limitation of his patent; that condition must be satisfied before the monopoly is granted. * * *”

Universal Oil Products Co. v. Globe Oil & Refining Co., 322 U.S. 471, 64 S.Ct. 1111:

“* * * The claim is required to be specific for the very purpose of protecting the public against

extension of the scope of the patent. (Citing cases).”

Boyden Power-Brake Co. et al. v. Westinghouse et al., Westinghouse et al. v. Boyden Power-Brake Co. et al., 170 U.S. 537, 707 (1898):

“The difficulty we have found with this claim is this: That, if it be interpreted simply as a claim for the function of admitting air to the brake cylinder directly from the train pipe, it is open to the objection (held in several cases to be fatal) that the mere function of a machine cannot be patented.”

Holland Furniture Co. v. Perkins Glue Co., 277 U.S. 245, 474 (1928).

Otis Elevator Co. v. Pacific Finance Corporation, 71 Fed. (2d) 641 (C.C.A. 9):

“* * * Although it is true, as petitioner suggests, that a function is not patentable because it is not within the patentable subject-matter defined in Rev. St. Sec. 4886 (35 U.S.C.A. Sec. 31), it is also true that a patent claim may be invalid for insufficiency of description under section 4888, because it describes the invention in terms of function or result without sufficient description of the means devised to accomplish that function or result. (Citing cases.)”

Otis Elevator Co. v. Pacific Finance Corporation et al., 68 Fed. (2d) 664 (C.C.A. 9, 1934).

“Even a casual reading of the claim and the master’s finding discloses that the invalidity was not merely because of indefiniteness, but because it covered only a function.”

B. B. Chemical Co. v. Cataract Chemical Co., 112 Fed. (2d) 526 (C.C.A. 2, 1941).

United Carbon Co. et al. v. Binney & Smith Co., 317 U.S. 228, 63 S.Ct. 165.

American Lava Co. et al. v. Steward et al., 155 Fed. 731 (C.C.A. 6, 1907);

Kalle & Co. et al. v. Multazo Co., Inc., 109 Fed. (2d) 321 (C.C.A. 6, 1940).

Following all these cases is the case of

Halliburton Oil Well Cementing Company v. Walker et al., 71 U.S.P.Q. 175 (decided Nov. 18, 1946), Sup. Ct.

“Under these circumstances the broadness, ambiguity, and overhanging threat of the functional claim of Walker become apparent. What he claimed in the court below and what he claims

here is that his patent bars anyone from using in an oil well any device heretofore or hereafter invented which combined with the Lehr and Wyatt machine performs the function of clearly and distinctly catching and recording echoes from tubing joints with regularity. Just how many different devices there are of various kinds and characters which would serve to emphasize these echoes, we do not know. The Halliburton device, alleged to infringe, employs an electric filter for this purpose. In this age of technological development there may be many other devices beyond our present information or indeed our imagination which will perform that function and yet fit these claims. And unless frightened from the course of experimentation by broad functional claims like these, inventive genius may evolve many more devices to accomplish the same purpose. See *United Carbon Co. et al. v. Binney & Smith Co.*, 317 U.S. 228, 236 (55 U.S.P.Q. 381, 385-386); *Burr v. Duryee*, 1 Wall. 531, 568; *O'Reilly, et al. v. Morse, et al.*, 15 How. 62, 112-13. *Yet if Walker's blanket claims be valid, no device to clarify echo waves, now known or hereafter invented, whether the device be an actual equivalent of Walker's ingredient or not, could be used in a combination such as this, during the life of Walker's patent.*

Had Walker accurately described the machine he claims to have invented, he would have had no such broad rights to bar the use of all devices now or hereafter known which could accent waves. For had he accurately described the resonator together with the Lehr and Wyatt apparatus, and sued for infringement, charging the use of something else used in combination to ac-

cent the waves, the alleged infringer could have prevailed if the substituted device (1) performed a substantially different function; (2) was not known at the date of Walker's patent as a proper substitute for the resonator; or (3) had been actually invented after the date of the patent. *Fuller v. Yentzler*, supra, at 296-97; *Gill v. Wells*, supra, at 29. Certainly, if we are to be consistent with Rev. Stat. 4888, a patentee cannot obtain greater coverage by failing to describe his invention than by describing it as the statute commands."

This Court of Appeals in *Farmer's Cooperative Exchange, Inc. v. Turnbow et al.*, 111 Fed. (2d) 728, followed the rule. In that case the Court said:

"Claim 8, of the claims in question, is one of the most specific. It is: 'A non-lethal parasiticide for internal administration, for intestinal parasites, comprising the combination of a nicotine substance in a dose normally parasiticial to said parasites and lethal to the subject being treated on ingesting the same alone, and an organic colloid, said organic colloid rendering said dose non-lethal to the subject being treated and leaving it parasiticial to said parasites.'

* * * * *

* * * As said in *General Electric Co. v. Wabash Appliance Corp.*, 304 U. S. 364, 368, 58 S. Ct. 899, 901, 82 L. Ed. 1402: " * * * Recognizing that most inventions represent improvements on some existing article, process, or machine, and that a description of the invention must in large part set out what is old in order to facilitate the understanding of what is new, Congress requires

of the applicant "a distinct and specific statement of what he claims to be new, and to be his invention." (35 U.S.C.A. § 33.) Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirement as to claims of invention or discovery. * * *

The claims here violate that rule, and are void because 'conveniently functional language at the exact point of novelty' is used. *General Electric Co. v. Wabash Appliance Corp.*, supra, 304 U.S. 371, 58 S. Ct. 903, 82 L. Ed. 1402. See, also *Wood v. Underhill et al.*, 46 U. S. 1, 4, 5 How. 1, 4, 12 L. Ed. 23; *The Incandescent Lamp Patent*, 159 U. S. 465, 474, 16 S. Ct. 75, 40 L. Ed. 221.

In this connection appellees in attempting to distinguish *General Electric Co. v. Wabash Appliance Corp.*, supra, contend that 'each and every of these claims specify the ingredients as well as the quantity or proportion of such ingredients'. We are unable to agree with that contention. *An entire class of ingredients is specified not specific 'ingredients'*. The quantity or proportion of the class is not specified except 'in conveniently functional language'.

The instant case is one illustrative of the practice followed in many patents. The inventors experimented with and compounded particular alkaloidal substances with particular colloidal substances. Instead of confining their claims to that which they actually discovered, if anything, they attempted to monopolize all parasitocides which could be made from the entire class of alkaloidal substances with the entire class of colloidal substances."

In applying the above case and the *Halliburton* case, the Lane patent claims specify only,

- (a) the entire class of formation testers
- (b) the entire class of gun perforators
- (c) the entire class of packers

without regard to the construction or mode of operation of such devices and, therefore, are invalid.

A further case in point is *Heidbrink et al. v. McKesson*, 290 Fed. 665 (C.C.A. 6, 1923). One claim in controversy was as follows:

“2. A gas-administering device having a mixing chamber, means for supplying thereto from independent sources of supply a plurality of gases each under pressure and in fixed proportions at their respective pressures, means for controlling the respective pressures at which the several gases are delivered to the mixing chamber, and means for definitely regulating and determining the aggregate volume of flow of said gases into the mixing chamber at their respective pressures while maintaining said fixed proportions.

* * * * *

With this statement of the situation, we come to his two claims of 1,265,910. We are compelled to think that they are invalid because functional. They are apparently most deliberately and skillfully drafted to cover any means which any one ever may discover of producing the result; that is, to accomplish the one thing while avoiding the other. We think they are clearly to be condemned under the rule stated in *O'Reilly v. Morse*, 15 How. 62, 112, 14 L. Ed. 601, *Risdon v. Medart*, 158 U. S. 68, 77, 15 Sup. Ct. 745, 39 L.

Ed. 899, and the many familiar cases applying the rule, and that they are not within the principle of the Telephone Case, 126 U. S. 1, 634, 8 Sup. Ct. 778, 31 L. Ed. 863.”

We urge, therefore, that this Court find the patent claims of the patent in suit totally invalid on the grounds that they are functional, ambiguous, indefinite and failing to comply with R. S. § 4888.

THE RULE OF THE HALLIBURTON CASE AS APPLIED BY THE
VARIOUS CIRCUIT COURTS OF APPEALS SHOWS ITS
PERTINENT APPLICABILITY TO THE SUIT AT BAR.

Refrigeration Patents Corporation v. Stewart-Warner Corporation (C.C.A. 7), 159 Fed. (2d) 972, at 976.

“As an answer to this contention, the Halliburton case, *supra*, states: ‘*Patents on machines which join old and well-known devices with the declared object of achieving new results, or patents which add an old element to improve a pre-existing combination, easily lend themselves to abuse. And to prevent extension of a patent’s scope beyond what was actually invented, courts have viewed claims to combinations and improvements or additions to them with very close scrutiny. * * ** It is quite consistent with this strict interpretation of patents for machines which combine old elements to require clear description in combination claims. * * * Cogent

reasons would have to be presented to persuade us to depart from this established doctrine.'

Appellees say that 'neither defendant, nor anyone else, need have any difficulty in determining whether its coil is so constructed and operated as to be non-frosting * * *.' Since a 'non-frosting coil' is a desired *result*, and not a means, it seems evident to us that patentees should be entitled at most only to their particular inventive means to achieve that result, not every possible means which may be conceived in the future to achieve the same result. As the Supreme Court said in the Halliburton case, *supra*: 'In this age of technological development there may be many other devices beyond our present information or indeed our imagination which will perform that function and yet fit these claims. And unless frightened from the course of experimentation by broad functional claims like these, inventive genius may evolve many more devices to accomplish the same purpose. * * *.' "

CONCLUSION.

We respectfully submit that this Court should find the patent in suit and the claims thereof totally invalid upon each of the following grounds:

- (a) That the patent does not disclose a patentable invention.
- (b) That the patent in suit purports to cover a mere aggregation and not a patentable combination.

(c) That the patent in suit does not describe and illustrate an apparatus which will work practically in industry, and the patent is therefore invalid under R. S. § 4888.

(d) That the apparatus disclosed in the patent in suit will not work practically in industry when constructed and operated in accordance with the specifications and drawings of the patent and the patent is therefore invalid.

(e) That the claims of the patent in suit are so functional, ambiguous and indefinite that they fail to comply with R. S. § 4888 and are therefore invalid.

We further respectfully submit that the District Court's ultimate findings and conclusions that the apparatus of the patent in suit involved invention, and that said patent and its claims are valid, are in error and that that portion of the judgment of the District Court adjudging said patent and the claims thereof to be valid should be reversed.

Dated, San Francisco, California,
March 4, 1949.

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No. 11965.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LANE-WELLS COMPANY, a corporation,

Appellant,

vs.

M. O. JOHNSTON OIL FIELD SERVICE CORPORATION,
a corporation,

Appellee.

M. O. JOHNSTON OIL FIELD SERVICE CORPORATION,
a corporation,

Cross-Appellant,

vs.

LANE-WELLS COMPANY, a corporation,

Cross-Appellee.

CROSS-APPELLEE'S ANSWERING BRIEF.

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Cross-Appellee.

CROSS-APPELLEE'S ANSWERING BRIEF.

Introduction.

This is a brief on behalf of Lane-Wells Company, Defendant in the declaratory judgment action in the Court below and Cross-complainant in that action. Lane-Wells Company is Appellant in this Court on a question of law with regard to the infringement of the Lane patent and Cross-appellee as to the question of the fact of the validity of the Lane patent. This brief is an answering brief on

the cross-appeal to the "Opening Brief on Behalf of Appellant M. O. Johnston Oil Field Service Corporation."

Lane-Wells Company, Defendant, Cross-complainant, Appellant, and Cross-appellee, is herein designated as "Defendant", and the adverse party is herein designated as "Plaintiff", to avoid the confusion (to the writer of this brief) involved in the use of the complete appellations of the parties.

This cross-appeal and the briefs therein are concerned entirely with the question of the fact of the validity of the Lane patent. The District Court found the Lane patent valid.

The principal contentions of Plaintiff in its "Opening Brief on behalf of Appellant M. O. Johnston Oil Field Service Corporation", and the only ones thought deserving of comment, appear to be:

(1) The Lane patent is invalid because directed to an aggregation (p. 25).

(2) The Lane patent is for an "abstract idea" instead of a combination of elements and is invalid (p. 17).

(3) The combination defined by the claims of the Lane patent is without utility (p. 44).

(4) The claims of the Lane patent are indefinite, and hence the patent is invalid (pp. 60, 72).

(5) The combination defined by the claims of the Lane patent involves only mechanical skill and not the inventive faculty, and hence the Lane patent is invalid (pp. 38, 53).

Each of these contentions is refuted herein in correspondingly numbered sections.

I.

**The Lane Patent in Suit Is Not for an Aggregation
but a True Combination and Is Valid.**

A. The Court so Found and Concluded.

In its Conclusion of Law 5 the Court held that “the Lane patent discloses a patentable invention” [Tr. 71], and in its Conclusion of Law 4, after discussing the question of aggregation, the Court made the same conclusion [Tr. 70], thus supporting its Finding of Fact 42 to the effect that the combined gun perforator and formation tester, such as disclosed and covered by the Lane patent, will obtain a formation sample in low pressure sands such as cannot be obtained where the gun perforator and formation tester are used separately [Tr. 61].

B. The Combination of Elements of the Lane Patent Claims Accomplishes Results That Are Better Than and Different From the Results of the Operation of the Elements Used Separately.

(1) Upon Making a Production Test of an Oil Sand at Low Pressure, the Combined Gun Perforator and Formation Tester, Such as Disclosed in the Lane Patent, Will Obtain a Sample Such as Could Not Be Secured by Using Such Tools Separately.

When perforating and testing by running a perforating gun into a well, perforating the casing, and withdrawing the gun, and thereafter as a separate operation running a formation tester into the well and securing a sample and withdrawing it, the time interval between the perforating and the testing is a matter of several hours [Finding 40, Tr. 61].

When perforating and testing using the combined gun perforator and formation tester, such as disclosed in the Lane patent, the time interval between perforating and taking of the sample is usually a matter of from four to fifteen minutes [Finding 41, Tr. 61].

During this time interval between perforating and testing, the rotary mud within the casing under the full pressure of the column of mud equal to the depth of the well is forced out into the newly perforated formation, and water from the rotary mud escapes into and mingles with the liquids within the formation, contaminating and diluting them and leaving the mud cake formed by the escape of such water tenaciously deposited upon the face of the perforated formation.

The record establishes that it is frequently desirable to establish the salinity of the water taken as samples from a formation in a well, because this salinity in different levels of the formations in the well usually differs; if the salinity of the sample truly reflects the salinity of the formation liquid, the level at which the sample is taken may be accurately determined; if it does not, such level cannot be determined [Testimony of Plaintiff's President, Johnston, Tr. 404-05]. Thus the invasion of the fresh water from the mud into the formation in the several hours during which the mud is permitted to infiltrate the formation, using the gun perforator and formation tester separately, contaminates, masks, and makes infinitely more difficult the determination of the source of the salt water sample taken than when the combined perforator and formation tester is used, which permits such invasion for only four to fifteen minutes [Testimony of Plaintiff's President, Johnston, Tr. 406]. Therefore, a result as regards the determination of the source of a salt water sample is accom-

plished by the combined gun perforator and formation tester incapable of accomplishment by use of the gun perforator and formation tester separately.

The mud cake which is deposited upon the surface of the perforated formation by the escape of water from the mud into the formation, obviously, is formed much thicker during the several hours that the mud is in contact with the perforated formation when the gun perforator and formation tester are used separately than it is formed during the four to fifteen minutes during which the mud is in contact with the perforated formation using the combined gun perforator and formation tester. This mud cake is dense, leathery, impervious, and resists the flow of the formation liquids into the formation tester.

The Court found "subjecting a candidate-oil-producing zone through perforations in a well casing to the pressure of the mud fluid in the well casing, for a matter of hours between perforating the casing and taking a formation test, would have some effect in retarding the flow of oil or native formation fluid from such zone into the tester, because of the penetration of filtrate water into the zone and the forming of mud cake in the perforations during the time interval between perforating and testing" [Finding 38, Tr. 60].

Obviously, the accuracy of the sample secured is more important when taken from a low pressure oil sand than from a high pressure oil sand, because a less than representative sample is more likely to be secured from a low

pressure sand and result in a well being shut down instead of produced.

Supported by the foregoing is the finding made by the Court that in making a production test from an oil sand under low pressure "the taking of a test immediately following perforation would result in obtaining a formation sample such as could not be obtained where a test is made in a matter of several hours after perforation" [Finding 42, Tr. 61].

It is not surprising, therefore, that the President of the Plaintiff readily agreed that, if no sample were secured utilizing the gun perforator and formation tester separately, such is no reliable indication that a sample would not have been secured using the combined gun perforator and formation tester such as disclosed by the Lane patent:

"Q. * * * My question presupposes this operation, Mr. Johnston: that you had run or someone had run a gun perforator separately from the tester, and then in the performance of your separate testing service you had run a tester into the well separately from the gun perforator to secure a sample and you secured no sample; now, is that a reliable indication that if, instead of running the separate tools, you had run the combined tool, you would not have gotten a sample?
A. No; it is not a reliable indication. . . ." [Tr. 424.]

Here is another result accomplished by the combined gun perforator and formation tester incapable of accomplishment by the use of such tools separately.

- (2) *It Is Not Necessary to Use a Bailer or Swab With the Gun Perforator and Formation Tester of the Lane Patent, but if a Bailer or Swab Is Used, a More Representative Sample Is Secured Than Is Secured by the Use of the Gun Perforator and Formation Tester Separately.*

The President of the Plaintiff testified that a formation tester has utility and is desirable for use in a well having sufficiently high pressure to flow the well fluids upwardly through it to the surface of the ground [Tr. 139]. Obviously, the combined gun perforator and formation tester of the Lane patent has the same utility and desirability in such well. Under such circumstances a bailer or swab is not necessary in the Lane apparatus to withdraw the sample.

If a bailer or swab is used with the Lane apparatus in wells of lesser pressure to withdraw the sample, a more representative sample is secured than is secured using the gun perforator and formation tester separately for the reasons set forth in the preceding section (1).

- (3) *The Combined Gun Perforator and Formation Tester of the Lane Patent Saves Time, and Hence Expense, by Securing a Formation Sample More Quickly Than It Can Be Secured by the Use of a Gun Perforator and Formation Tester Separately.*

This was the testimony of Plaintiff's President Johnston [Tr. 408]. This was the finding of the Court made in its original finding [Finding 70, Tr. 67] and its supplementary finding: "The combination of a perforator and tester such as that described in the Lane patent in

suit No. 2,029,491 accomplishes under certain conditions a saving of time and money over the separate use of its elements” [Amended Finding 42, Tr. 79].

The authorities are legion and well known to this Court that, if a patented plurality of elements accomplishes a new and better result or an old result in a more facile, economical, and efficient manner, such plurality of elements is a patentable combination as contrasted with an unpatentable aggregation.

“ . . . So a new combination of known devices, whereby the effectiveness of a machine is increased, may be the subject of a patent. . . .”

Cantrell v. Wallick, 117 U. S. 689, 29 L. Ed. 1017, at 1018 (1886).

“With respect to the result produced, it is not essential that it be a wholly new result, but it is sufficient if an old result is effected in a more facile, economical, or efficient way. *Galvin Elec. Mfg. Co. v. Emerson Elec. Mfg. Co.* (C. C. A. 8), 19 F. (2d) 885, 888; *Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co.* (C. C. A. 8), 215 F. 362, 369; *New York Scaffolding Co. v. Whitney* (C. C. A. 8), 224 F. 452, 456; *National Hollow Brake-Beam Co. v. Interchangeable B.-B. Co.* (C. C. A. 8), 106 F. 693, 706, 707; *Skinner Bros. Belting Co. v. Oil Well Imp. Co.* (C. C. A. 10), 54 F. (2d) 896; *Grinnel Washington Mach. Co. v. E. E. Johnson Co.*, 247 U. S. 426, 432, 38 S. Ct. 547, 62 L. Ed. 1196.”

Independent Oil Well Cementing Co. v. Halliburton, 54 F. 2d 900, 905 (C. C. A. 10, 1932), (cert. denied 286 U. S. 544, 76 L. Ed. 1281).

“The result need not be new. It is sufficient if an old result be produced in a more facile, economic or efficient way. *Willard v. Union Tool Company*, 9 Cir., 253 F. 48; *New York Scaffolding Co. v. Whitney*, 8 Cir., 224 F. 452.”

Long v. Dick, 38 Fed. Supp. 214, 220 (Calif. D. C. 1941).

“The primary object of the second patent is to provide a method and apparatus for mixing water and cement and for conveying the mixture to the point of use and depositing it in its final form before its quality has been impaired by setting or hardening to an appreciable degree. This is a unitary result produced by the combined forces of the mixer and conveyer, and it could only be accomplished by maintaining a synchronous relation between the speed of the mixer and the speed of the conveyer. While it is true that the mixer mixes the cement and the conveyer thereafter takes it and conveys it to the point of use, yet it is because of co-operation and co-ordination between the two that the object of depositing the mixture in place with such speed as conditions permit and require and with the quality unimpaired by reason of the setting or hardening of the cement is accomplished.* There is co-ordination of action between the mixer and the conveyer in that their speeds are synchronized; there is co-operation in that one mixes and the other conveys, and the mixture produced by the former exactly equals that which the latter immediately conveys and puts in place. This co-ordination and co-operation is possible because the speed of the mixer can be controlled by regulating the pressure

*Throughout this brief all underlines are ours.

and velocity of the stream of water which proportions and mixes the cement and water. The result produced is more than the aggregate of mixing and conveying, it is mixing and conveying in synchronous relation so that the cement is put in place with its quality unimpaired. While the result is old, it is accomplished in a new and more facile, economical, and efficient way.

“We conclude that the claims of the second patent in suit, set out in Note 2, are patentable combinations.”

Independent Oil Well Cementing Co. v. Halliburton, 54 F. 2d 900, 906-07 (C. C. A. 10, 1932), (cert. denied 286 U. S. 544, 76 L. Ed. 1281).

“It is said that it is an aggregation and not a combination that the guide spools operate in the same way that they have always operated; and so of the other elements. This is true, but not fatal, for it is not necessary to a valid combination that one element shall affect the quality of the work done by another. It is said that the elements are but hitched together, and therefore are not patentable. Nor is this the test. The test is whether the combination discloses a co-operation or a co-ordination of the elements which, working together as a unit, although mayhap not simultaneously, produces a new or better result. The distinction between combination and aggregation is one difficult to put in words that really define; it has been the subject of much legal literature which we find it unnecessary to review. Walker (6th Ed.), §§70, 71, deals with it at length. Justice Matthews drew an analogy from real estate law; joint tenants the com-

bination, tenants in common the aggregation. *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749. Judge Hook compared an aggregation to 'successive changes of horses in a coach journey from London to Bath. Those out of London, their task done, dropped their burden at Maidenhead; others picked it up there, and carried it to Newbury; and so on to destination.' *Moore v. Saunders* (C. C. A. 8), 247 F. 314, 317. Following his analogy, four horses hitched to a coach would be a combination. Where definitions are abstract, there is a natural disposition to resort to analogy. A rough analogy, that cannot be pressed too far, has repeatedly occurred to me in considering this question. I think of a football team as a combination; one passes, one receives, another blocks, another runs, and still others hold the line. Eleven men are doing different things, each in his own way, and not always simultaneously; yet they are working to a common end, to advance the ball; and they coact as a unit. I think of a track team as an aggregation; one runs, another hurdles, another jumps, another throws. They all work for a common general end, to amass points for their alma mater; but there is lacking the vital spark of co-operation or co-ordination. They work, not as one unit, but as several. In the case at bar, we have no doubt that the device is a combination and not an aggregation. A single object is to be accomplished; to prevent escape of the oil from the well. All the elements co-ordinate in working to that end. It is not a relay of horses from London to Bath; it is a three-horse hitch to the same coach. We conclude that the first patent is valid."

Skinner Bros. Belting Co. v. Oil Well Improvements Co., 54 F. 2d 896, 898-9 (C. C. A. 10, 1931).

“Are claims 1 to 4 patentable combinations?

“The applicable principles of law are well settled by the adjudicated cases.

“In *Hailes v. Van Wormer*, 20 Wall. 353, 368 (22 L. Ed. 241), the court said:

“‘It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination and not a mere aggregate of several results each the complete product of one of the combined elements.’

“See, also, *Palmer v. Corning*, 156 U. S. 342, 15 S. Ct. 381, 39 L. Ed. 455; *Grinnell Washing Machine Co. v. Johnson Co.*, 247 U. S. 426, 432, 433, 38 S. Ct. 547, 62 L. Ed. 1196.

“In *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* (C. C. A. 8), 106 Fed. 693, 706, 707, the court said:

“‘The second claim of the first patent to Hien is for a combination of old mechanical elements in a new way. It is not for new elements, but for a new method of combining old elements; and a new combination of old elements, whereby a new and useful result is produced, or an old result is attained in a more facile, economical, and efficient way, may be protected by patent as securely as a new machine or composition of matter. *Seymour v. Osborne*, 11 Wall. 516, 542, 548, 20 L. Ed. 33; *Gould v. Rees*, 15 Wall. 187, 189, 21 L. Ed. 39; *Thomson v. Bank*, 53 F. 250, 252, 3 C. C. A. 518, 520, 10 U. S. App. 500, 509.’

“See, also, Ottumwa B. C. Loader Co. v. Christy B. C. Loader Co., *supra*; New York Scaffolding Co. v. Whitney, *supra*; Disc Grader & Plow Co. v. Auston Western Road Machinery Co. (C. C. A. 8), 254 F. 430, 433; Minneapolis, etc. Co. v. Barnett & Record Co. (C. C. A.), 257 F. 302, *supra*; Sodemann Heat & Power Co. v. Kauffman (C. C. A. 8), 275 F. 593, 596; St. Louis Street Flushing Machine Co. v. American Street Flushing Machine Co. (C. C. A. 8), 156 F. 574, 576; Frey v. Marvel Auto Supply Co. (C. C. A. 6), 236 F. 916, 919; Zip Mfg. Co. v. Pusch, *supra*.

“In Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf B. Co. (C. C. A. 6), 230 F. 120, 127, the court said:

“‘If every element was old, invention would still exist if the combination either produced a new and useful result or effected an old result in a new and materially better way.’

“In Ohmer Fare Register Co. v. Ohmer (C. C. A. 6), 238 F. 182, 190, the court said:

“‘In order to escape aggregation, it is not necessary that all the constituents so enter into the combination as to coact all the time with all the others or change the mode of connection with every other. It is sufficient that the elements so coact that as a consequence of their union a new and useful result, and not a mere aggregation of several results, follows.’

“In Willard v. Union Tool Co. (C. C. A. 9), 253 F. 48, 53, the court said:

“‘Nor is it necessary that the action of the elements be simultaneous. Pelton Waterwheel Co. v. Doble, 190 F. 760, 111 C. C. A. 488; Burdett-Rowntree Mfg. Co. v. Standard Plunger E. Co. (C. C.),

196 F. 43; *Novelty Glass Mfg. Co. v. Brookfield*, 170 F. 946, 95 C. C. A. 516; *Krell Auto Grand Piano Co. v. Story & Clark Co.*, 207 F. 946, 125 C. C. A. 394. Nor is it necessary that one of the constituent elements shall so enter into the combination as to change the action of the others. *International Mausoleum Co. v. Sievert*, 213 F. 225, 129 C. C. A. 569. It is sufficient if there be some joint operation performed by the elements producing a result due to their co-operative action.'

"See, also *Pelton Waterwheel Co. v. Doble* (C. C. A. 9), 190 F. 760; *New York Scaffolding Co. v. Whitney* (C. C. A. 8), 224 F. 452, 458; *National Cash Register Co. v. American Cash Register Co.* (C. C. A. 3), 53 F. 367, 371; *International Mausoleum Co. v. Sievert* (C. C. A. 6), 213 F. 225, 229.

"An examination of claims 1 to 4, inclusive, in the light of the principles above stated discloses, we believe, that they are valid combinations . . ."

Galvin Electric Mfg. Co. v. Emerson Electric Mfg. Co., 19 F. 2d 885, 890 (C. C. A. 8, 1927).

- C. That the Packer, Gun Perforator, and Formation Tester in the Combined Tool Perform Their Inherent Functions and Are Individually Old Does Not Detract From the Patentability of Their Combination; Otherwise No Valid Patent on a Combination of Old Elements Could Exist.

As the Court may well judicially notice, almost without exception mechanical patents issued now and in the last several decades have been for a plurality of mechanical elements each of which was individually old. Thus in a printing press, new, useful, and inventive, the elements might be an old lever, an old gear train, old platens, old

rollers, and old pressure devices, each performing its inherent function, and still the patent therefore may be valid.

There are numerous decisions to the effect that (and none known to the writer to the contrary) the fact that all of the elements of a claimed combination are individually old does not detract from the patentability of the combination if the combination be new.

“ . . . Conceding for the purpose of the argument, that the elements are all old and that each element used produces no new result, yet we are convinced that a beneficial result has been produced in a more efficient, economical and facile manner, and we feel constrained to hold the claims valid. *New York Scaffolding Co. v. Whitney*, 8 Cir., 224 F. 452.”

E. R. Wagner Mfg. Co. v. Porter Steel Specialties,
116 F. 2d 63, 67 (C. C. A. 7, 1940).

“In discussing the validity of the patent in suit, it may be admitted that all the elements in appellee’s structure were old in the art. Appellee claims, however, that its structure is a new combination of these elements which produces a novel and useful result (or an old result in a more facile, economical, and efficient way). If this be true, it is sufficient to uphold the patent. *New York Scaffolding Co. v. Whitney* (C. C. A.), 224 F. 452.”

Young Radiator Co. v. Modine Mfg. Co., 55 F. 2d 545, 546 (C. C. A. 7, 1931) (Rehearing denied 1932).

Indeed, there are numerous decisions holding that from the fact that the elements of a device are claimed as a combination it may be presumed that each of the elements individually is old in the art.

“The patent being for a combination, and no claim being made for a patent on any one of the elements, it is conclusively presumed either that they were old in the art or not patentable. *Richards v. Chase Elevator Co.*, 159 U. S. 477, 486, 16 S. Ct. 53, 40 L. Ed. 225; *City of St. Louis v. Prendergast*, 29 F. 2d 188 (C. C. A. 8).”

Harris v. Ladd, 34 F. 2d 761, at 762 (C. C. A. 8, 1929).

All of the Plaintiff's cases cited in the section of its brief commencing at page 25 and relating to aggregation are distinguishable, and most of them by the quotations utilized by the Plaintiff in its brief, in that there was involved in such cases a union of elements which accomplished no new or better result or no old result in a more facile, economical, or efficient manner.

For the reason that the combination of elements of the Lane patent claims accomplishes results that are better than and different from the results of the operation of the elements used separately, for the reason that the fact that the packer, gun perforator, and formation tester in the combined tool of the Lane patent perform their inherent functions and are individually old, does not detract from the patentability of their combination, and for the reason that the Court so found and concluded, it is submitted that the Lane patent in suit is not for an aggregation but a true combination and is valid.

II.

The Lane Patent Is for a Combination of Mechanical Elements, Not an "Abstract Idea," and Is Valid.

A. The Claims of the Lane Patent in Issue Define, Not an "Abstract Idea," but a Combination of Mechanical Elements and Their Physical and Cooperative Relationship.

Claims 9 and 14, for example, define a packer, a gun unit or means, and a receiving device or entrapping means, so related that the packer divides the well bore into two zones, the gun unit being connected with the packer and firing a projectile into the formation surrounding the well bore to open one of the zones for the passage of fluids from the formation along the path of the projectile, and the receiving or entrapping device having an intake passage connected with the fluid-receiving zone to receive fluid introduced from the formation through the path formed by the projectile. Here certainly is no "abstract idea"; here clearly is a combination of mechanical elements defined specifically by their physical and cooperative relationship.

B. Plaintiff's Cases With Respect to an "Abstract Idea" Being Unpatentable Are Distinguishable From the Factual Situation Here Presented.

It is submitted that the excerpt from the decision of *Killefer Mfg. Co. v Dinuba Associates, Ltd.*, 67 F. 2d 362, at 366, is not quoted with complete fairness because it omits those parts of the decision which establish that the idea involved in the patent was sufficiently applied to a definite mechanism by the patent, and both the idea and the mechanism were anticipated by prior patents.

" . . . But, assuming that the idea involved in the patent is sufficiently applied to a definite mechan-

ism by the patent description and drawings of the lever, the wheel, the pawl, and the mounting of the carriage with its tools eccentrically with reference to the center of the traction wheels, we still have a very broad claim even if it be conceded that the novelty of the patent consists solely in the method of releasing the pawl. The very breadth of this claim endangers its validity because of the number of patents covering portions of this same field. Many of such patents of power lift implements are set up by the appellant as anticipations of the appellee's claim . . .” (p. 366.)

“These patents for power lift agricultural implements applied for and issued before the Petzoldt patent show a system of disengaging the pawl of the lifting device by a succeeding pin of the small wheel anticipating the Petzoldt patent.” (p. 367.)

“We conclude that claim 1 of the Petzoldt patent is invalid because anticipated by the Beckwith patent above referred to and so far as the claim is predicated upon the disengaging of the pawl by a following pin of the wheel as described in the claim was anticipated by the Rupprecht and Mader patents . . .” (p. 368.)

Such is not the case here presented, for clearly there is no prior patent disclosing the combination defined by the claims of the Lane patent.

The remaining decisions cited in the section of Plaintiff's brief commencing at page 17 are likewise easily distinguishable from the facts here involved.

R. G. Le Tourneau, Inc. v. Garwood Industries, Inc., 151 F. 2d 432 (Pltf. Br. p. 21), in the excerpts quoted by Plaintiff, bases its decision on the fact that there is

no new or different result achieved by the patented combination.

Knapp v. Morse, 150 U. S. 221, 14 S. Ct. 81, quoted at page 22 of Plaintiff's brief, is based upon the finding that the invention covered by a patent must "consist of new and useful means of obtaining that end," with which requirement the invention of the Lane patent clearly complies.

The remaining decisions quoted in this section of Plaintiff's brief establish merely that invention, rather than mechanical skill, must be involved in the provision of a combination of elements subject of a valid patent.

We do not dissent from this doctrine of law, have often urged it ourselves, and submit that it applies here to establish the validity of the Lane patent as found by the District Court in its Conclusion 5 discussing mechanical ingenuity and ending with the statement: "it is therefore concluded that the Lane patent discloses a patentable invention."

C. The Law Applicable to the Facts Here Presented Is That a New Combination of Old Mechanical Elements Accomplishing a New and Better Result or an Old Result in a More Facile, Economical, and Efficient Manner Is a Patentable Combination.

Cases establishing this doctrine are collected herein *supra* under Point I-B(3).

That the Court clearly understood the claims of the Lane patent as defining a combination of mechanical ele-

ments appears from the record [Tr. 356, 357]. That Plaintiff and Plaintiff's counsel likewise understood the Lane patent claims to be directed to a combination of mechanical elements and not an "abstract idea" appears not only from the record [Tr. 98] but also from the original Complaint itself, which recites in Paragraph VII:

"That in the event that claims numbered 7, 8, 9, 11, 12, 13, and 14 of Letters Patent No. 2,029,491 . . . are valid and interpreted and applied literally as worded, that the same can be read upon the Johnston Perforator and Formation Tester manufactured, operated, and used by this Plaintiff and would be infringed thereby." [Tr. 5.]

For the reason that the claims of the Lane patent define, not an "abstract idea," but a combination of mechanical elements and their physical and cooperative relationship, for the reason that Plaintiff's cases with respect to an "abstract idea" being unpatentable are distinguishable from the factual situation here presented, and for the reason that the law applicable to the facts here is that a new combination of old mechanical elements accomplishing a new and better result or an old result in a more facile, economical, and efficient manner (as does the Lane claimed combination) is a patentable combination, it is submitted that the Lane patent is for a combination of mechanical elements, not an "abstract idea," and is valid.

III.

**The Combination of the Lane Patent Is Useful and
the Patent Is Valid.**

A. The Court Has So Found.

In its amendment to Finding 42 [Tr. 79], the Court found

“The combination of a perforator and tester such as that described in the Lane patent in suit, No. 2,029,491, accomplishes under certain conditions a saving of time and money over the separate use of its elements.”

In its original Finding 48, the Court held

“Claims 7-9, inclusive, and 11-14, inclusive, of the Lane patent in suit disclose a combination that is useful.” [Tr. 63.]

This is a finding of fact.

In its Conclusion of Law 7, the Court said:

“The Lane patent, No. 2,029,491 is valid as to claims 7-9, inclusive, and 11-14, inclusive.” [Tr. 71.]

This same conclusion of validity and the conclusion that the Lane patent discloses a patentable invention are three times reiterated in the Court’s Conclusions 4, 5 and 6. [Tr. 71.]

B. The Record Establishes That the Combined Gun Perforator and Formation Tester of the Lane Patent Can Successfully Secure a Sample of the Formation Liquids.

The Court, in part of its Finding 31, stated:

“a satisfactory sample could possibly be secured by adding a liquid cushion above the sample in the Lane apparatus before the packer is released and by employing a bean at the surface of the ground, thus controlling the rate of inflow of the mud to the apparatus after the packer is unseated.” [Tr. 59.]

It is the testimony of the President of the plaintiff that prior to December, 1930, he had observed the use of such beans in oil well tubing to control the rate at which the well fluids entered the tubing at the bottom of the well and the rate at which they were discharged from the top of the well [Tr. 198-199] so that the bean or valve control referred to in the Court's Finding was old in the art before the application for the Lane patent was filed.

The use of bailers and swabs was likewise old in the art for drawing a liquid from a formation tester [Plaintiff's President, Tr. 140 and 149]. Mr. M. O. Johnston clearly admitted that in the use of a bailer with his formation tester, Exhibit 17-Q, a sample could be secured with the bailer:

“Q. By Mr. Foster: 17-Q. It was also possible in that device after you had secured your sample in the tubing, 35 of Figure 1, to run down with the bailer and get some of the sample and withdraw it through the tubing, wasn't it? A. Yes, you could do that.

Q. Now referring to Exhibit 9—I mean that was a practical operation to do if one wanted to do it?

A. Yes, if one wanted to do it. Yes, they could do it.” [Tr. 154-155.]

In the face of the admission by Plaintiff’s President that such a bailing operation is not only possible but practical, it is difficult to understand how plaintiff’s counsel can now urge that the same bailing operation through the same tubing is not both possible and practical in the Lane apparatus.

Plaintiff’s expert O’Neill testified that when he went into the oil fields in 1920, it was the practice for the oil companies to make tests of wells by bailing or swabbing [Tr. 209]; plaintiff’s expert Barton admitted that tests by bailing were made many years ago [Tr. 366]; and plaintiff’s witness O’Neill, in demonstrating what was purported to be a model of the Johnston accused combined tool, stated his intention to secure a sample from this tool by bailing it out [Tr. 254-255]. In spite of this established antiquity of the bailing and swabbing operations and the admitted possibility and practicability of bailing a sample from a Johnston tester and a purported model of a Johnston combined gun perforator and formation tester, it is now asserted by Plaintiff that such an operation is not practical with the Lane combined gun perforator and formation tester. The record establishes the lack of merit of this contention.

Plaintiff’s President testified that his Johnston formation tester had “utility and was desirable in the respect that it would permit the well to flow upwardly through it to the surface if the pressure were enough in the formation” [Tr. 139]. We cannot see why the Lane forma-

tion tester and perforator tool would not likewise have utility and be desirable under the same circumstances.

In view of all of the foregoing, it is submitted that plaintiff's contention of impracticability and lack of utility in its opening brief is not well founded.

C. A Patent Is Not Invalid for Lack of Utility Because the Embodiment of the Invention It Illustrates and Describes Is Not the Best Commercial Form or Requires Changes or Additions or the Use of Other Devices Known in the Art.

"Imperfections in a machine, not affecting the substance of the invention, and which are curable by mechanical skill, do not render the patent inoperative. Dalton Adding Mach. Co. v. Rockford Milling Mach. Co. (D. C.), 253 F. 187; Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 F. 845, 48 C. C. A. 72; Western Telephone Mfg. Co. v. American Electric Telephone Co., 131 F. 75, 65 C. C. A. 313; Engineer Co. v. Hotel Astor (D. C.), 226 F. 779; Electric Smelting & Aluminum Co. v. Pittsburg Reduction Co., 125 F. 926, 60 C. C. A. 636; Scott v. Fisher Knitting Mach. Co., 145 F. 915, 76 C. C. A. 447; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 S. Ct. 698, 46 L. Ed. 968; Dashiell v. Grosvenor, 162 U. S. 425, 16 S. Ct. 805, 40 L. Ed. 1025."

Remington Cash Register Co., Inc. v. National Cash Register Co., 6 F. 2d 585, 629 (D. C. Conn., 1925).

"The appellant's attack on the sufficiency of the disclosures is directed to the fact that it is not stated in the patent that the hair is to be wound under tension on the curling rod. There is no merit in this

contention. The patent was directed to those skilled in the art where the Croquignole wave was not new and where it was well known that strong tension must be applied to the hair while winding in order to produce a permanent wave. The disclosure was sufficient."

Johnson Co., Inc. v. Philad Co., 96 F. 2d 442, at 443 (C. C. A. 9, 1938).

"It is assumed, as claimed by plaintiffs, that the value of the Franklin device was made so that it would let the contents of the pipe escape while it was being taken out of the well. But by mere substitution of a tight valve for a leaky one the device would be made to hold and bring up samples from the formation below the packer. The difference between the Franklin valve, leaking while being drawn from the well, and that of the patent in suit, purposely made to close tightly, is not an essential or patentable element.

" . . . The process consists of 'lowering an empty string of pipe,' 'setting the packer,' 'opening the valve inlet,' 'closing the valved inlet,' 'raising the pipe so closed to remove an entrapped sample and the packer from the well.' The result to be achieved by the method claimed to be new is precisely the same as that for the attainment of which the apparatus found to be old was contrived.

" . . . It cannot reasonably be held that anything more than mechanical skill of men familiar with known methods of obtaining oil from formations be-

low packers would be required to suggest the raising of the pipe containing fluid entrapped and held by effective closing of the valve."

Honolulu Oil Corporation, Ltd. v. Erle P. Halliburton, 306 U. S. 550, 83 L. Ed. 980, at 985, 987 (1939).

It is worthy of note that the plaintiff found it necessary to make numerous changes in the gun perforator of its commercial design as compared with the gun perforator described and illustrated in the Collins patents, under which it has and does pay royalty [Tr. 184-185].

Consistent with the foregoing decisions, it must be noted that the use of beans, cushions of liquid, swabs, and bailers was old and well known to those skilled in the art, as established by the portions of the record hereinbefore identified.

D. The Claims of the Lane Patent Are Not Invalid for Lack of Utility of the Structure Described Unless the Structure Is Proved Incapable of Performing Any Useful Function Whatsoever; It Is Not Sufficient to Negative Utility That the Patented Device May Not Function Under Certain Circumstances.

“ . . . Whatever may be said of the Burdick patent, it is in evidence that brushes made under it are capable of being used to some extent. Complainants show that they have placed a number of them on the market and have received numerous testimonials as to their value. Defendant's evidence shows that they can be made to do only a limited quality of work . . .

“It requires only slight evidence of successful operation to avoid the defense here set up”

Thayer & Chandler v. Wold, 142 Fed. 776, 778
(C. C. N. D. Ill. 1906) (Affirmed 148 Fed. 227,
C. C. A. 7, 1906).

“Defendant further asserts that the structure disclosed by Lowenstein is not useful. It is well settled that a patent is prima facie evidence of utility, and doubts relative to the question should be resolved against infringers. *Crown Cork & Seal Co. v. Aluminum Stopper Co.* (C. C. A.), 108 F. 845. When this defense is relied upon, the evidence must show a total incapacity of the invention to do anything claimed for it, because neither imperfect operation nor a total failure to perform part of the claimed functions will sustain the defense of want of utility. *Seymour v. Marsh*, 6 Fish. Pat. Cas. 115, Fed. Cas. No. 12,687. Defendant has not introduced any evidence which meets the test, but plaintiff has introduced theoretical evidence based upon practical use, which convinces me that the Lowenstein condenser produced the result ascribed to it in the patent.”

Scovill Mfg. Co. v. Satler, 21 F. 2d 630, at 634
(D. C. Conn. 1927).

“. . . And in all cases the evidence must show a total incapacity in the invention to do anything claimed for it, because neither imperfect operation, nor a total failure to perform part of the claimed functions, will sustain a defense of want of utility. [*Seymour v. Marsh*, 6 Fish. Pat. Cas. 115, Fed. Cas. No. 12,687, C. C., Pa. (1872).]”

Walker on Patents, Deller's Edition, Sec. 720, p.
2031.

“ . . . The machine patented may be imperfect in its operation but if it embodies the generic principle and works, that is, if it actually and mechanically performs, though only in a crude way, the important function by which it makes the substantial change claimed for it in the art, it is enough. Telephone Cases, 126 U. S. 1, 535, 31 L. Ed. 863, 989, 8 Sup. Ct. Rep. 778; Mergenthaler Linotype Co. v. Press Pub. Co., 57 Fed. 502, 505.”

Herbert L. Hildreth v. Jim M. Mastoras, 257 U. S. 27, 66 L. Ed. 112, 116-17 (1921).

“A device need not be perfect in order to escape the charge of inoperativeness. It is obvious that McLean’s device is not perfect, and it may be that defendant’s device is the better of the two; but if, as I am convinced, McLean was the first to devise a combination of old elements which would come near enough to producing constant pressure nearly atmospheric in a fire box, to effect large savings in fuel, then he is entitled to make subsequent improvers pay tribute to him. The test of operativeness is to ascertain whether the patented device does (even lamely and imperfectly) perform the acts claimed for it in the method described and (perhaps) for the reasons given”

Engineer Co. v. Hotel Astor, 226 Fed. 779, 783 (D. C. N. Y.) (1914).

The record establishes, as hereinbefore set forth, that the device disclosed in the Lane patent and defined by its claims is capable of performing the useful objects

stated in the patent and desirable functions in the entrapping and securing of a sample of formation liquids. Hence, the foregoing authorities are clearly here applicable.

E. Plaintiff Has Paid Tribute to the Utility of the Claimed Invention by Appropriating It.

This is established by the Complaint originally filed.¹ This was admitted by Plaintiff's counsel at the trial.²

"On the other hand, the defendants, having used machines which embody plaintiff's patent, cannot be heard to dispute the utility of the patent. *Lehnbeuter v. Holthaus*, 105 U. S. 94, 96, 97, 26 L. Ed. 939; *International Tooth Co. v. Hanks Association (C. C.)*, 111 F. 920, 921; same case affirmed, 122

¹"That in the event that claims numbered 7, 8, 9, 11, 12, 13 and 14 of Letters Patent No. 2,029,491 . . . are valid and interpreted and applied literally as worded, that the same can be read upon the Johnston Perforator and Formation Tester manufactured, operated and used by this plaintiff and would be infringed thereby." [Tr. 5.]

²"The Court: If they are as broad as claimed and are valid in that breadth, to that extent, you freely concede there has been infringement.

Mr. Mellin: I think the court just put, in other words, exactly what I pleaded.

Mr. Foster: That applies to both patents, Mr. Mellin?

Mr. Mellin: Of course." [Tr. 98.]

F. 74, 58 C. C. A. 180; *Cummer & Son Co. v. Atlas Co.*, 193 F. 993, 997, 113 C. C. A. 611; *Boyce v. Stewart*, 220 F. 118, 126, 136 C. C. A. 72.”

Dunkley Co. v. Central California Canneries, 7 F. 2d 972, 976-77 (C. C. A. 9, 1925; Rehearing denied 1925) (Cert. denied 245 U. S. 668, 62 L. Ed. 539).

“ . . . defendants have quite closely followed the process of plaintiff’s reissue patent and have produced a correspondingly like product. An infringer is estopped from denying utility and operability. *Dunkley Co. v. Cent. Calif. Canneries* (C. C. A.), 7 F. 2d 972, 976; *Boyce v. Stewart-Warner Corp.* (C. C. A.), 220 F. 118, 126.”

Kansas City Southern Ry. Co. v. Silica Products Co., 48 F. 2d 503, 505 (C. C. A. 8, 1931; Rehearing denied 1931) (Cert. denied 284 U. S. 626, 76 L. Ed. 533).

F. Industry Has Paid Tribute to the Utility of the Claimed Invention by Paying Royalty for Its Use.

Defendant’s Exhibit AK is a license agreement, pursuant to which McCullough Tool Company secured a license under the Lane patent and agreed to pay, and has paid, a royalty for the use of the combination gun perforator and formation tester of \$15.00 if the test is made at a depth of less than 6,000 feet and \$1.00 additional for each 1,000 feet or fraction thereof at a depth deeper than 6,000 feet, and a royalty of five per cent of the amount received upon each such tool sold for use outside the United States [Tr. 691].

Pursuant to said agreement a report was made by McCullough Tool Company, Defendant's Exhibit AM-1 [Tr. 698] and payment was made for the single month covered by the report, amounting to \$650.00, as shown by Defendant's Exhibit AM-2 [Tr. 701].

For all of the reasons hereinbefore set forth it is submitted that the combination of the Lane patent is useful, and the patent is valid.

For the reason that the Court has found the combination of the Lane patent defined by its claims to be useful, for the reason that the record establishes that such Lane combination can successfully secure a sample of the formation liquids, for the reason that a patent is not invalid for lack of utility because the embodiment it discloses is not the best commercial form or requires the use of other devices known to those skilled in the art (and auxiliary devices adapted for use with the Lane apparatus were well known to those skilled in the art), for the reason that such combination is not proved incapable of performing any useful function whatsoever, for the reason that the Plaintiff has paid tribute to the utility of the claimed invention by appropriating it, and for the reason that industry has paid tribute to the claimed invention by paying royalty for its use, and in the light of the authorities herein cited, it is submitted that the combination defined by the claims of the Lane patent is useful, and the patent is valid.

IV.

**The Claims of the Lane Patent Are Definite, Comply,
With R. S. 4888, and Are Valid.**

A. The Court So Specifically Held in Its Conclusion 6 [Tr. 71] and Also Generally So Held in Its Conclusions of Validity Numbered 4, 5 and 7 [Tr. 70, 71].

B. Plaintiff and Its Counsel Clearly Understood the Claims of the Lane Patent.

This is shown by the fact that the original Complaint admitted that, if the words of the claims were given their ordinary meaning, they were infringed by the accused apparatus;³ it is shown also by the fact that Plaintiff's counsel at the trial made the same admission.⁴

C. Plaintiff's Expert Clearly Understood the Claims of the Lane Patent.

This is established by the fact that O'Neill testified that he had no difficulty (after reading the Lane patent, with all of the benefits of its disclosure before him and with "hindsight") in combining a gun perforator, formation tester, and packer as illustrated at page 39 of Plaintiff's Opening Brief here in a manner which Plaintiff's counsel contends and illustrates meets the terms of the Lane claims by the provision of all of the mechanical elements defined in such claims.

³See footnote 1, *supra*.

⁴See footnote 2, *supra*.

D. The Doctrine of the Halliburton Case⁵ Does Not Apply to the Claims of the Lane Patent.

This is true for a number of reasons:

(1) The claim involved in the *Halliburton* decision defined every one of its elements as “means”;⁶ the Lane patent claims do not.

The *Halliburton* decision expressly reaffirmed the holding in the *Paper Bag Case* (210 U. S. 405, 52 L. Ed. 1122), which held not invalid as indefinite the claim there involved which defined some but less than all of the elements as “means.”⁷

⁵71 U.S.P.Q. 175; 91 L. Ed. 15 (Advance Sheet).

⁶“In an apparatus for determining the location of an obstruction in a well having therein a string of assembled tubing sections interconnected with each other by coupling collars, means communicating with said well for creating a pressure impulse in said well, echo receiving means including a pressure responsive device exposed to said well for receiving pressure impulses from the well and for measuring the lapse of time between the creation of the impulse and the arrival at said receiving means of the echo from said obstruction, and means associated with said pressure responsive device for tuning said receiving means to the frequency of echoes from the tubing collars of said tubing sections to clearly distinguish the echoes from said couplings from each other.” (*Ibid.*, p. 19, footnote.)

⁷“2. In a paper bag machine, the combination of the rotating cylinder provided with one or more pairs of side folding fingers adapted to be moved toward or from each other, a forming plate also provided with side forming fingers adapted to be moved toward or from each other, means for operating said fingers at definite times during the formative action upon the bag tube, operating means for the forming plate adapted to cause the said plate to oscillate about its rear edge upon the surface of the cylinder during the rotary movement of said cylinder for the purpose of opening and forming the bottom of the bag tube, a finger moving with the forming plate for receiving the upper sheet of the tube and lifting it during the formative action, power devices for returning the forming plate to its original position to receive a new bag tube, and means to move the bag tube with the cylinder.” (*Ibid.*, pp. 21, 22, footnote.)

The Lane patent claims here involved defining less than all of their elements as “means” are the type of the claim of the *Paper Bag Case*, not the type of the claim of the *Halliburton Case*, and hence are valid and definite.

“ . . . Every structural element of the Walker claim, apart from the preamble, was expressed by a ‘means’ clause including the specific contribution of the patentee. In distinguishing the claim of the Walker patent from the claim of the *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 S. Ct. 748, 52 L. Ed. 1122, the Court in the Walker case said (67 S. Ct. 12): ‘In that case, however, the claims structurally described the physical and operating relationship of all the crucial parts of the novel combination.’ The Court in the Walker case held that the invention in the Paper Bag case was adequately described. We are convinced that the claims here in issue cannot be said to consist with the claims of the Walker patent but they are in every respect similar to the claims in the Paper Bag case. See also *O’Reilly v. Morse*, 56 U. S. 62, claim 8, at page 112, 14 L. Ed. 601.

“It is urged by appellant that some of the claims are functional. If so, such language is in words of limitation which express the relationship of the structural elements only, and for this reason such claims are not to be considered as functional.”

Minnesota Mining & Mfg. Co. v. International Plastic Corporation, 159 F. 2d 554, at 558 (C. C. A. 7 1947).

(2) The requisites to certainty found absent in the claims in the *Halliburton Case* are here present.

In the *Halliburton Case* it was held that the claim was invalid, because it did not recite “the physical structure” of the element new in the combination or “the physical relation” of this element to the other elements or “the manner in which” the new element “will operate together with” the other elements. These requisites were stated in the alternative; if any one had been present, the claim would have been sustained.

In the claims of the Lane patent (e. g., claim 11):

(a) All of the elements are old;

(b) “The physical relation” of the sample receiving means to the gun unit is defined as “having an inlet in proximity to said gun unit”;

(c) “The manner in which” the packer means “will operate together with” the sample receiving means is defined as “minimizing the introduction of fluids into said sample receiving means from sources other than the avenue provided by said projectile.”

All three of the requisites to certainty absent in the *Halliburton Case* are present in the Lane patent claims.

(3) The patent involved in the *Halliburton* decision discloses a single embodiment of the invention; the Lane patent discloses two embodiments.

In the Lane patent one embodiment is illustrated in Figs. 1 to 4 of the drawings, and another embodiment is shown in Fig. 5, and both embodiments are described in the specification and defined in the claims (e. g., claims 7 and 8 as to one form, and claims 9, 11, 12, 13, and 14 as to another form).

In holding that the doctrine of the *Halliburton Case* should not be applied, the Circuit Court of Appeals for the Seventh Circuit stated:

“ . . . in the Walker case the specification of the patent disclosed only one means for accomplishing the objective of the patentee, while the claim covered all means by which it also could be accomplished. . . . ”

Minnesota Mining & Mfg. Co. v. International Plastic Corporation, 159 F. 2d 554 (1947).

In an article Mr. Nathan A. Conn, Examiner of Division 25 of the United States Patent Office, has written with respect to the *Halliburton* decision:

“Thus this ground of holding the claim invalid as being too broad is really based upon another principle, namely, the lack of disclosure of alternative forms required to form a basis for a generic claim.”

Journal of the Patent Office Society, Vol. XXIX, No. 4, April, 1947, p. 289, at 293.

(4) The prior art devices involved in the *Halliburton* decision were inherently capable of accomplishing the result of the patented structure; this is not true in the instant case.

None of the prior art relied upon by Plaintiff discloses a combined gun perforator, formation tester, and packer. Plaintiff's President testified that he had never known of such a combination tool prior to his production of it or prior to the Lane patent.⁸

⁸“Q. Never before the applications for the patents in suit, the Lane and Spencer patents, did you ever see, hear of, or know of any use, invention by others, or any disclosure in a printed publica-

Mr. Nathan A. Conn, hereinbefore referred to, has written with respect to the *Halliburton* decision:

“In other words, in view of the fact that the field was crowded and that, if Lehr and Wyatt had perceived that the shoulder echoes could be seen on their recording device by proper magnification, they could have obtained Walker’s result without any change in their apparatus. Walker could not be given a claim so broad as to amount to all means for accomplishing the improved result. For this result was substantially inherent in Lehr & Wyatt’s apparatus.”

Journal of the Patent Office Society, Vol. XXIX, No. 4, April, 1947, p. 289, at 294.

(5) In the *Halliburton Case* the Court held that the field of invention was “crowded almost, if not completely, to the point of exhaustion”; such is not the situation in the instant case.

None of the prior art disclosed the combination of the claims of the Lane patent, and there was no such combination in existence prior to the Lane patent.⁹

For all of the foregoing reasons it is respectfully submitted that the doctrine of the *Halliburton* decision does not apply to the claims here involved and that the claims of the Lane patent are definite, comply with R. S. 4888, and are valid as found by the District Court.

tion or a patent of a combined gun perforator, packer and formation tester in a unitary tool that could be run into and withdrawn from a well as a unit; that is true, isn't it? A. As a unit; only separately.

Q. With that qualification, you agree that that is true? A. That is true up to the time of that patent.

Q. Of the patents in suit? A. Of the patents in suit.” [Tr. 424-25.]

⁹See footnote 8 *supra*.

V.

The Lane Patent Is for a Combination Involving the Inventive Faculty, More Than Mechanical Skill, and Is Valid.

A. The Court So Held.

In its Conclusion 5 relating to the contrast between mechanical skill and invention, the Court stated “it is therefore concluded that the Lane patent discloses a patentable invention” [Tr. 71], as well as finding that the claims of the Lane patent define “a combination that is new” and “a combination that is useful” [Findings 47, 48, Tr. 62, 63].

B. The Court’s Findings With Respect to the Johnston Accused Tool Are in No Way Inconsistent With Invention Being Involved in the Lane Patented Device.

In its Findings 57, 58 and 65 [Tr. 64, 66], the Court found the accused apparatus to comprise standard elements requiring no structural modification and only mechanical skill for their assembly.

This is wholly consistent with, and indeed emphasizes, the presence of invention in the Lane apparatus, because:

(1) The accused device was admittedly made after full knowledge of the Lane patent and indeed after attempts had been made by Plaintiff to secure a license under it [Exhibit 30-B-1 to 5].

(2) Obviously, the gun perforator and formation tester were designed to facilitate their assembly into the accused combined tool.

(3) No prior patent discloses such a combined gun perforator, formation tester, and packer, and none was

known prior to the Lane patent [Tr. 424-25; see footnote 8, *supra*].

(4) Attempts to provide such a combined tool by utilizing patents prior to Lane required many modifications and resulted in a tool which was admittedly impractical and of no utility.¹⁰

C. Plaintiff's Attempt by Its Expert, With Full Knowledge of the Lane Patent and "Hindsight," to Provide the Lane Patented Combination From Old Patents Establishes That Invention Was Involved in the Lane Combination.

Knowledge of the Lane patent has been admitted [Exhibit 30-B-1 to 5].

Plaintiff's expert O'Neill testified in response to his counsel's questions that in order to unite the gun perforator of the Mims patent, Plaintiff's Exhibit 17-G, with the formation tester of the Simmons patent, Plaintiff's Exhibit 17-S, as illustrated in Plaintiff's Exhibit 22, it was necessary to:

(1) Drill through the cap at the bottom of the perforated anchor of the Simmons device;

(2) Drill a hole upwardly through the center of the stem of the Simmons tool;

(3) Place a packing at each end of the last identified hole;

¹⁰*Post*, subdivision C of this point.

(4) Pass an electrical cable out through the side of the collar at the top of the Simmons device; and

(5) Use instead of a conical packer [as disclosed in Plaintiff's Exhibit 22] a different style of packer, such as a hook wall packer or a regular casing packer.

Obvious from even a casual examination of the Simmons patent [Plaintiff's Exhibit 17-S, Tr. 617] and the Mims patent [Plaintiff's Exhibit 17-G, Tr. 548] is the fact that none of these changes are disclosed, suggested, or intimated by either of them.

As stated by this Court in *Bianchi v. Barili*, 78 U. S. P. Q. 5, at 7 (1948):

“In *Topliff v. Topliff and Another*, 145 U. S. 156, 161, the court said:

“‘It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.’”

If this construction of a combined gun perforator, formation tester, and packer of Simmons and Mims, in a manner not suggested, contemplated, or hinted at by either of these patents, provided any combined tool as illustrated by Plaintiff's Exhibit 22 [Tr. 655] which was considered as involving no invention (even though it were formed with “hindsight” of the Lane patent), it is an impractical tool as established by the testimony of Plaintiff's President

that to thread an electrical conductor through the drill pipe or tubing "would not be practical to do" [Tr. 180, 197].¹¹

Plaintiff's President Johnston, in spite of his many years spent in the oil tool industry, was unable even as an expert to combine an old gun perforator with his own formation tester, as shown by his testimony.¹²

¹¹"Q. On your redirect examination you referred to the possibility of combining the gun perforator of the Mims patent with your present tester and packer, and stated that the electrical conductor wire or cable could be run through the tubing to the surface of the ground. Now, as a practical man, with your experience in the oil fields, you would not think it practical to run 10,000 feet of electrical cable through the well tubing or drill string when you had to thread that two miles of wire through each section of the tubing or string as you assembled it and withdraw it as you removed it, would you? A. Mr. Foster, it certainly would not be a practical thing to do but it could be done." [Tr. 196-97.]

¹²"Q. Now, when you were speaking of combining it with your tester, you had reference to a tester such as is illustrated and described in the patent marked Plaintiff's Exhibit 17-Y, for identification; is that correct? A. That is a gun. That is not a tester.

Q. Oh, I am sorry. You had in mind a tester such as illustrated and described in your patent marked Plaintiff's Exhibit 17-U, for identification; is that correct? A. Yes, sir.

Q. And that conductor I imagine could be stopped so that it was energized by contact, for example, with the lower end of the valve cage 35. Would that be a good way to do it? A. I don't know how you would ground out or get through it. You are getting a little—my electrical knowledge doesn't teach me that. I know you can take two wires leading from it, that you can do that. My electrical knowledge is limited on cables, but I suppose that there could be an insulated conductor and this be of some material, and this be Bakelite or a non-conductor, and you can do that. I imagine an electrical engineer could figure that out.

Q. So that the record is clear, Mr. Johnston, I don't mean to go beyond your knowledge and experience, but so the record may be clear, you were pointing to the element indicated by the numeral 35 in Fig. 1 of Exhibit 17-U as being the locality where the circuit might be closed by the lowering of that valve cage in order to energize the gun; is that correct? A. That's correct, yes, sir." [Tr. 180-81.]

Furthermore, it is obvious that Plaintiff's Exhibit 22, as reflected on page 39 of the Opening Brief on behalf of Appellant M. O. Johnston Oil Field Service Corporation, is an impractical tool, since the packer is a rathole packer, permitting the perforator gun to perforate only in the rathole in open formation, which obviously is not required and never an operation performed to secure a sample, since the formation is open to sampling without perforating.

A comparison of Plaintiff's Exhibit 22 with Defendant's Exhibit AI-2 demonstrates graphically that Plaintiff's accused device does not in any way resemble that combination of old patents made by Plaintiff's expert in an attempt to approach the combination of the Lane patent. On the contrary, this exhibit demonstrates that Plaintiff has followed the teachings of the Lane patent instead of the teachings of the prior art.

Plaintiff's President Johnston testified as follows:

"Q. Well, in designing or making your combined tool, that is, the perforator and tester which is the subject of the suit here, did you utilize the perforator of this Mims patent which is Exhibit 17-G, for identification? A. Did I use the Mims gun?

Q. Yes. A. No, I didn't use the Mims gun." [Tr. 178.]

"Q. By Mr. Foster: Did you ever use a gun perforator such as illustrated and described in the Mims patent? A. No, I never used the Mims gun." [Tr. 179.]

D. There Are No Prior Art Patents Closer or More Pertinent to the Disclosure and the Structure Defined by the Claims of the Lane Patent Than the File Wrapper References Considered by the Patent Office.

The Patent Office considered numerous patents relating to gun perforators, packers, etc. during the prosecution of the application for the parent of the Lane patent in suit, *i. e.*, No. 2,029,490, and the application for the patent in suit. These prior patents disclose the separate elements of the claimed combination here involved to be old, and the Patent Office allowed the claims in issue over these references clearly on the theory that a new combination of old elements was patentable.

The prior art references [Plaintiff's Exhibits 17-A to W] are no closer than the file wrapper references considered by the Patent Office. This is graphically illustrated upon Defendant's Exhibit L, the pertinent portions of which, omitting references to the Spencer patent, are reproduced as Exhibit A to this brief.

“ . . . To the presumption of validity that attaches to a granted patent, where the most pertinent prior art has been cited against it in the patent office, there must probably now be added the force of a growing recognition of finality that is generally being accorded to administrative determinations supported by evidence, on the ground that the administrative agency is expected to have developed an expertness in its specific field beyond what may be expected from the courts wherein adjudications range the whole field of human controversies. . . .”

Williams Mfg. Co. v. United Shoe Mach. Corporation, 121 F. 2d 273, 277 (C. C. A. 6, 1941, (Aff'd) 316 U. S. 364; 86 L. Ed. 1537).

“The best reference cited by the defendant as the nearest approach to Hibbard was the Maxwell patent, No. 1,089,659 issued to the defendant March 10, 1914. This patent was considered and rejected by the Patent Office in connection with the Hibbard application, thereby strengthening the regular presumption of validity of the Hibbard patent. *Smokador Mfg. Co. v. Tubular Products Co.* (C. C. A.) 31 F. (2d) 255, 257; *Elkon Works v. Welworth Automotive Corporation* (D. C.) 25 F. (2d) 968, 970.”

Electric Machinery Mfg. Co. v. General Electric Co., 13 Fed. Supp. 940, 942 (D. C. S. D. N. Y.) (1936). (Modified and affirmed 86 F. 2d 11, C. C. A. 2 1937.)

“Defendant’s expert picked this Corey patent as the nearest approach to the invention of the patent in suit, but the patent in suit was granted after consideration of the Corey patent by the Patent Office, and this strengthens the presumption of validity of the patent in suit.”

Elkon Works, Inc. v. Welworth Automotive Corporation, 25 F. 2d 968, 970 (D. C. N. Y. 1928).

For the foregoing reasons it is respectfully submitted that the Lane patent is for a combination involving in its production the inventive faculty, more than mechanical skill, and is therefore valid.

VI.

The Findings of the District Court as to the Validity of the Claims of the Lane Patent, Being Findings of Fact, Should Not Be Set Aside Since They Are Supported by Substantial Evidence.

In support of this conviction we rely upon recent decisions of this Court:

“(3) We are of the view that the trial court committed no error in its factual findings and that its determination and application of the law was and is correct.

“(4) The question of whether or not a new and useful combination is the result of mere mechanical skill, or of inventive faculty, is one of fact.

“(5) What constitutes invention as distinguished from a mere aggregation, is a question of fact.

“(6) Questions of invention and patent validity are questions of fact.

“(7) Whether prior art patents or publications disclose or anticipate the subject matter of a patent in issue is determined as a question of fact.

“(8) The issue of infringement presents a question of fact.

“(9) The Gibbs patent was regularly issued and its claims are presumptively valid.”

Faulkner v. Gibbs, 170 F. 2d 34, at 37 (C. C. A. 9, 1948). (Rehearing denied 1948.)

“The court, by its above mentioned findings, determined two questions—the question of novelty and the question of invention. Both were questions of fact. *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 9 Cir., 151 F. 2d 91 [66 USPQ 396]; *Maulsby*

v. Conzevoy, 9 Cir., 161 F. 2d 165 [73 USPQ 249].
The findings are supported by substantial evidence,
are not clearly erroneous and should not be disturbed.

. . . ”

Refrigeration Engineering, Inc. v. York Corporation, 78 U. S. P. Q. 315, at 317 (C. C. A. 9, 1948).

“ . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . ”

Federal Rules of Civil Procedure, Rule 52(a).

Only a portion of the evidence supporting the Findings and Conclusions of the District Court that the Lane patent claims in issue are valid has been presented herein. This portion of such evidence, it is submitted, is sufficient to establish that the Findings and Conclusions of such validity are supported by substantial evidence, and hence such Findings and Conclusions should not be reversed.

Conclusion.

We think that the District Court considered, and this Court will consider, as fitting the factual situation here presented as neatly as a glove, the statement made by this Court in *Bianchi v. Barili* (decided by this Court June 15, 1948, and reported at 78 U. S. P. Q. 5 and 6) :

“Before a patent can be declared invalid because of anticipation, its lack of novelty must be established beyond a reasonable doubt. *Cantrell v. Wallick*, *supra*, at pages 695-696; 1 Walker §63, pages 300-303; *American Bell Telephone Co. v. People's Telephone Co.* [CC NY], 22 F. 309, 313, affirmed, 126 U. S.

1, 572; Searchlight Horn Co. v. Victor Talking Machine Co. [DC NJ], 261 F. 395, 401.

“Particularly heavy is the attacker’s burden when the validity of the patent has been sustained by court findings. General Motors Corporation v. Kesling [CCA 8], certiorari denied on March 15, 1948, 333 U. S. 855 [76 USPQ 621], 164 F. 2d 824, 827 [76 USPQ 30, 32, 33], and the many cases there cited.”

For the reason that the Lane patent in suit is not for an aggregation but a true combination, for the reason that the Lane patent is for a combination of mechanical elements and not an “abstract idea”, for the reason that the combination of the Lane patent is useful, for the reason that the claims of the Lane patent are definite and comply with R. S. 4888, for the reason that the Lane patent is for a combination involving the inventive faculty as contrasted with mechanical skill, and for the reason that the findings of the District Court as to the validity of the claims of the Lane patent, being Findings of Fact, should not be set aside, since they are supported by substantial evidence, it is respectfully submitted that the cross-appeal of Plaintiff should be dismissed and the holding of validity of the Lane patent by the District Court sustained.

Dated: At Los Angeles, California, this 6th day of April, 1949.

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No. 11,965

IN THE
United States Court of Appeals
For the Ninth Circuit

LANE-WELLS COMPANY
(a corporation),

vs.

M. O. JOHNSTON OIL FIELD SERVICE
CORPORATION (a corporation),

Appellant,

Appellee.

ANSWERING BRIEF FOR PLAINTIFF-APPELLEE
(M. O. Johnston Oil Field Service Corporation).

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LANE-WELLS COMPANY
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M. O. JOHNSTON OIL FIELD SERVICE
CORPORATION (a corporation),

Appellee.

**ANSWERING BRIEF FOR PLAINTIFF-APPELLEE
(M. O. Johnston Oil Field Service Corporation).**

SUMMARY OF THE ARGUMENT.

A patent is subject to the same rules of construction as other contracts, and a Court may properly, if it deems necessary to maintain the validity of the patent, narrowly construe the claims and thus find non-infringement.

Goodyear Dental Vulcanite Co. v. Davis, 102

U.S. 222, 26 L. Ed. 149;

Greenawalt v. Am. Smelting, etc., Co. (C.C.A. 9), 10 Fed. (2d) 98;

McEwan Bros. Co. v. McEwan, 91 Fed. 787, at 790;

Bragg-Kliesrath Corp. v. Walter S. Vogel & Co. (C.C.A. 2), 67 Fed. (2d) 531;
Henry v. Los Angeles, 255 Fed. 769.

The apparatus disclosed in the patent in suit is constructed and has a mode of operation entirely different from the construction and mode of operation of the accused apparatus. Consequently, there can be no infringement.

McDonough v. Johnson-Wentworth Co. (C.C.A. 8), 30 Fed. (2d) 375, at 383;
Wilson & Willard Mfg. Co. v. Union Tool Co. (C.C.A. 9), 249 Fed. 729;
American Can Co. v. Hickmott Asparagus Canning Co. (C.C.A. 9), 137 Fed. 86;
Pacific States Electric Co. v. Wright (C.C.A. 9), 277 Fed. 756;
Measuregraph Co. v. Grand Rapids Show Case Co. (C.C.A. 8), 29 Fed. (2d) 263.

The District Court did not (as contended by appellant Lane-Wells) base its decision of non-infringement solely on the fact that no practical apparatus was ever built in accordance with the patent, but the District Court in addition based its decision of non-infringement upon its finding of fact that the accused apparatus is substantially different in construction and mode of operation from the apparatus disclosed in the patent in suit. Consequently, the District Court properly concluded as a matter of fact and law, in that the accused apparatus was substantially different in construction and mode of operation from the patent

in suit, a charge of infringement could not be sustained.

McDonough v. Johnson-Wentworth Co. (C.C.A. 8), 30 Fed. (2d) 375, at 383;

Wilson & Willard Mfg. Co. v. Union Tool Co. (C.C.A. 9), 249 Fed. 729;

American Can Co. v. Hickmott Asparagus Canning Co. (C.C.A. 9), 137 Fed. 86;

Pacific States Electric Co. v. Wright (C.C.A. 9), 277 Fed. 756;

Measuregraph Co. v. Grand Rapids Show Case Co. (C.C.A. 8), 29 Fed. (2d) 263.

The District Court also based its finding of non-infringement on the fact that no apparatus for practical use constructed according to the patent has ever been built and commercially used. The Court's reasons for such a ruling and a consequent limiting of the claims of the patent in suit were based upon the Court's finding of fact that under normal and usual circumstances the device of the Lane patent in suit would be impractical in industry to recover and bring to the surface of a well a beneficial test sample.

The Court having determined that the patent added nothing to the practical art, it was correct in construing the patent as narrowly as it possibly could, and obviously, when so construed, there could be no infringement by the accused apparatus.

McRoskey v. Braun Mattress Co. (C.C.A. 9), 107 Fed. (2d) 143;

Carl Braun, Inc. v. Kendall-Lamar Corporation (C.C.A. 2), 116 Fed. (2d) 663.

In so construing the patent claims and in finding non-infringement, the Court followed the well established rule of patent law which has been followed for many years by this Court that to find infringement there must be in the patented device and in the accused apparatus (1) identity of result; (2) identity of means for attaining that result; and (3) identity of mode of operation.

McDonough v. Johnson-Wentworth Co. (C.C.A. 8), 30 Fed. (2d) 375, at 383;

Wilson & Willard Mfg. Co. v. Union Tool Co. (C.C.A. 9), 249 Fed. 729;

American Can Co. v. Hickmott Asparagus Canning Co. (C.C.A. 9), 137 Fed. 86;

Pacific States Electric Co. v. Wright (C.C.A. 9), 277 Fed. 756;

Measuregraph Co. v. Grand Rapids Show Case Co. (C.C.A. 8), 29 Fed. (2d) 263.

It is the contention of appellant, Lane-Wells, that the claims read literally on the accused apparatus. Even granted that this is true, this Court has ruled and in so doing has followed the weight of authority that infringement is not a mere matter of words and is proved simply by language used in a claim without regard to the specifications. Infringement must be proved by showing that the claim covers what is alleged to infringe, when the claims are interpreted by the specifications which describe the invention.

Westinghouse v. Boyden, 170 U.S. 537, at 568;
Grant v. Koppl, 99 Fed. (2d) 106;

Electro-Dynamic Co. v. U. S. Light & Heat Corp. (C.C.A. 2), 278 Fed. 80, at 84.

PRELIMINARY.

In a separate appeal, the appellee herein* urges that the Lane patent in suit is totally invalid on several well-founded grounds, all based upon the Findings of Fact of the District Court. We urge that this present appeal be determined on the ground that the patent is invalid and consequently there can be no infringement thereof, and for the argument on invalidity, we respectfully refer to our opening brief on behalf of Johnston, who is the appellee here.

Appellant Lane-Wells' brief is based solely upon but one premise which, as we will point out hereinafter, is a false premise. That premise, as we understand it, is based upon appellant Lane-Wells' contention that the *only reason* for the District Court limiting the claims of the patent to a device constructed in accordance with the specification and drawings of the patent in suit, was that no practical device had ever been made in accordance with the teachings of the patent in suit.

Appellant Lane-Wells, in its brief, totally disregards the District Court's finding of fact that the accused apparatus is constructed and has a mode of operation entirely different from that of the apparatus of the patent in suit. From this finding the District Court concluded that no infringement could possibly be found.

*The appellee will be referred to herein as appellee Johnston and appellant will be referred to herein as appellant Lane-Wells to avoid confusion because in the cross appeal the appellee herein is referred to as appellant Johnston and the appellant is referred to as appellee Lane-Wells.

A PATENT IS SUBJECT TO THE SAME RULES OF CONSTRUCTION AS OTHER CONTRACTS AND A COURT MAY, IF NECESSARY TO MAINTAIN THE VALIDITY OF THE PATENT, NARROWLY CONSTRUER THE CLAIMS AND THUS FIND NON-INFRINGEMENT.

The following is quoted from *Walker on Patents*, Deller's Edition, Volume Two, page 1204, § 240:

“A patent is subject to the same general rules of construction as other contracts. (Goodyear Dental Vulcanite Co. v. Davis, 102 U.S. 222, 26 L. Ed. 149; Kelly Well Co. v. Kirschke Concrete Well Co., 14 F. (2d) 274, C.C.A. 8 (1926); Tompkins-Hawley-Fuller Co. v. Holden, 273 Fed. 424, C.C.A. 2 (1921); Minneapolis, etc. R. Co. v. Barnett, etc., Co., 257 Fed. 302, C.C.A. 8 (1919); O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, C.C.A. 8 (1913); Motion Picture Patents Co. v. Independent Moving Pictures Co., 200 Fed. 411, C.C.A. 2 (1912); O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, C.C.A. 8 (1905); National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693, C.C.A. 8 (1901); Elgin Co-op. Butter-Tub Co. v. Creamery Package Mfg. Co., 80 Fed. 293, C.C.A. 7 1897).)

“The entire instrument, including the drawings and specifications, should be considered in construing a patent. (Hogg v. Emerson, 6 How. (47 U.S.) 437, 12 L. Ed. 505, 11 How. (52 U.S.) 587, 13 L. Ed. 824; Greenawalt v. Am. Smelting, etc., Co., 10 F. (2d) 98, C.C.A. 9 (1926); International Banding Mach. Co. v. Amer. Bander Co., 9 F. (2d) 606, C.C.A. 2 (1925); Horton Mfg. Co. v. White Lily Mfg. Co., 213 Fed. 471, C.C.A. 7 (1913); O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, C.C.A. 8 (1913); Faultless Rubber Co.

v. Starr Rubber Co., 202 Fed. 927, C.C.A. 6 (1913).

* * * * *

“These are the declarations of the Supreme Court relevant to the proper liberality to be observed in construing patents. That liberality as often shows itself in a narrow construction as in a broad one; for narrow construction may be as necessary to establish the validity of a patent, as a broad construction is to lay the foundation for proof of its infringement. (McEwan Bros. Co. v. McEwan, 91 Fed. 787, 790, C.C., N. J.) Therefore when it becomes necessary to construe a claim narrowly, in order that its novelty may not be negated by the prior art, or its validity otherwise overthrown, courts will give such a narrow construction, if they can do so consistently with the language of the claim and of the description. (Klein v. Russell, 19 Wall. (86 U.S.) 433, 466, 467, 22 L. Ed. 116; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 25, 30, C.C. Mich.; Steam Gauge & Lantern Co. v. Williams, 50 Fed. 931, 932, C.C.A. 2; Van Ness v. Layne, 213 Fed. 804, 807-8, C.C.A. 5; Fowler & Wolfe Mfg. Co. v. M’Crum Howell Co., 215 Fed. 905, C.C.A. 2 (1914); Black & Decker Co. v. Baltimore Truck Tire Service Co., 40 F. (2d) 910, 914, C.C.A. 4 (1930); Bragg-Kliesrath Corp. v. Walter S. Vogel & Co., 67 F. (2d) 531, 532, C.C.A. 2 (1933).)”

Undoubtedly, the District Court attempted to sustain the validity of the patent and could do so only by narrowing the claims to the precise apparatus disclosed in the specification thereof, and when so narrowed, had to find non-infringement. The Court in so doing, added no elements to the claims nor sub-

tracted any. It merely construed the broad elements as having a construction and mode of operation disclosed in the specification and claims. This is consistent with the above authorities. It is also consistent with this Court's ruling in *McRoskey v. Braun Mattress Co.*, 107 Fed. (2d) 143. In that case the claims merely claimed "depressing members" of the frames. The claims did not specify whether these members were conical-shaped or not. In construing the claims, this Court referred to the specifications and found that the specification defined those "members" as being "conical-shaped" and consequently construed the claims as meaning "conical-shaped depressing members."

The district judge in the case at bar followed the same rule of construction, in that the claims did not specify what type of a gun the claims called for. In effect the District Court construed that element (the gun) as being a gun of the construction and mode of operation disclosed in the specification. Further, inasmuch as the claim did not specify what type of "a sample taking device or receiver", the Court in effect interpreted that element as being constructed and operated in accordance with the specifications. Then the District Court, finding that when so construed, the accused apparatus not being constructed and operated at all similarly to such a gun and sample receiver, could not possibly infringe the same.

We urge, therefore, as a matter of law, that the Court's ruling of non-infringement should not be disturbed.

ON PAGES 11 AND 12 APPELLANT, LANE-WELLS, ATTEMPTS TO ESTABLISH THAT THE ACCUSED DEVICE CONTAINS ALL OF THE ELEMENTS AND PERFORMS ALL OF THE OPERATIONS OF THE DEVICE DEFINED BY THE CLAIMS IN ISSUE. THIS IS A COMPLETE FALLACY.

In order to make this point, appellant sets out as follows:

“ ‘(a) After Finding of Fact No. 19 add:

“ ‘The following steps in the performance and use of the tool of the Lane patent in suit, No. 2,029,491, is described in such Lane patent, are identical with the steps in the performance and use of the Johnston accused tool as exemplified by defendant’s Exhibits AH-1, AH-2, and AH-3:

“ ‘1. The elements are assembled into a combined tool including a gun perforator, packer, and tester.

“ ‘2. The combined tool is lowered in the well to the point where it is desired to perforate.

“ ‘3. The gun is fired to perforate the casing.

“ ‘4. Several guns are fired successively.

“ ‘5. The drill pipe is rotated one turn to the left to unlatch the packer and set the slips.

“ ‘6. The weight of the drill pipe is lowered on the slips to set the packer.

“ ‘7. The drill pipe or tubing is open to the formation below the set packer.

“ ‘8. The entrance valve into the tool is left open until a sufficient quantity of the test liquids is secured in the tool. (85)’ (Tr. 78.)”

For the purpose of making an actual comparison in accordance with the testimony so that the Court

will be fully informed and not be misled by the partial facts stated, we make the following comparison of the above steps which actually relate to the apparatus itself and its mode of operation:

3. The gun is fired to perforate the casing.

The patented device:

In the patented device the gun is fired by successively sending down charges of compressed air through the drill pipe to the gun which operate an intricate apparatus causing firing of the gun.¹

Accused device:

The gun is fired by turning the drill stem a predetermined number of turns and then allowing the pressure of the mud within the well itself to exert its weight on a firing mechanism of entirely different type and design and mode of operation than that shown in the patent to fire a cartridge and initiate gun fire.²

5. The drill pipe is rotated one turn to the left to unlatch the packer and set the slips.

This precise packer was in common use for many years prior to the patent in suit and is the manner of operating prior casing packers.³

This precise packer was in common use for many years prior to the patent in suit and is the manner of operating prior casing packers.³

6. The weight of the drill pipe is lowered on the slips to set the packer.

This packer was in common use for many years prior to the patent in suit and is the old manner of operating prior casing packers.³

This packer was in common use for many years prior to the patent in suit and is the old manner of operating prior casing packers.³

¹R. 323.

²R. 263.

³Ex. 17-U, R. 632; Ex. 17-R, R. 613.

7. The drill pipe or tubing is open (opened) to the formation below the set packer.

The drill pipe or tubing is opened to the formation below the packer by firing a bullet through a casing surrounding the apparatus and thus opening a passageway to the formation.¹

In the accused apparatus a trip valve is arranged interiorly of the apparatus and is opened by means of a go-devil passed downwardly through the drill tubing in a manner entirely foreign to that of the patented apparatus.²

8. The entrance valve into the tool is left open until a sufficient quantity of the test liquids is secured in the tool.

There isn't any entrance valve in the tool of the patented device at all, and the entrance of the fluid into the patented device is always left open because, as stated on pages 18-19 of this brief, the later dropping of a ball in an attempt to shut it off in the patented device would not function, so there isn't any valve means at all to effect a closure of that entrance.

In the accused apparatus there is a main valve operative by means of manipulation of the drill pipe to close the entrance to the tool. There isn't any such element in the patented device or anything else that accomplishes its function, so there can be no similarity in construction or in mode of operation.²

Steps in the performance and use of the accused tool not found at all in the patented device and, of course, not mentioned by appellant Lane-Wells:

Step 9—Preventing contamination of sample by mud.

(Patented Apparatus)

(Accused Apparatus)

No operative provision is provided for the same and the

After a sample has been taken, the accused apparatus can be

¹R. 324.

²R. 227.

Court found as a fact⁴ that nothing was provided which would prevent the entrance of the mud fluid following the sample and thus destroying the effectiveness of the sample.

closed so as to entirely prevent any mud fluid from following the sample into the tool.³

Step 10—Uncontaminated sample recovered by elevating tool to surface.

No such function can be accomplished by the patented device as the Court found as a fact⁵ and therefore, in this regard, the patented apparatus and the accused apparatus have an entirely different construction and mode of operation.

In the accused apparatus, after the tool is closed, the sample can be elevated to the surface for examination by mere removal of the tool from the hole.³

Step 11—Use of additional apparatus or devices unnecessary.

The Court found as a fact⁶ that the patented device could not be run into the hole, take a sample and remove the sample to the surface by elevation of the tool itself, but if a sample was to be recovered at all, some auxiliary device or devices not described in the patent must be employed in conjunction with the tool in order to recover the sample. Consequently, there can be no similarity in mode of operation in the two devices.

The accused apparatus is capable of being run into the hole, taking an uncontaminated sample and removing it to the top of the hole for examination without the use of any additional apparatus or devices.³

³R. 227, 228, 229, 230, 231.

⁴Finding No. 32, R. 59.

⁵Findings No. 35 and No. 36, R. 59, 60.

⁶Findings No. 35 and No. 36, R. 59, 60.

THE DISTRICT COURT DID NOT (AS CONTENDED BY APPELLANT LANE-WELLS) BASE ITS DECISION OF NON-INFRINGEMENT MERELY ON THE FACT THAT NO PRACTICAL APPARATUS WAS EVER BUILT IN ACCORDANCE WITH THE PATENT, BUT THE DISTRICT COURT IN ADDITION BASED ITS DECISION OF NON-INFRINGEMENT UPON ITS FOLLOWING CONCLUSION¹ "THE ACCUSED APPARATUS BEING SUBSTANTIALLY DIFFERENT BOTH IN CONSTRUCTION AND MODE OF OPERATION FROM THAT DISCLOSED IN THE LANE PATENT NO. 2,029,491 IN SUIT, A CHARGE OF INFRINGEMENT CANNOT BE SUSTAINED", WHICH CONCLUSION WAS BASED ON FINDING OF FACT "THE ACCUSED APPARATUS IS SUBSTANTIALLY DIFFERENT IN CONSTRUCTION AND MODE OF OPERATION FROM THE APPARATUS DISCLOSED IN THE LANE PATENT NO. 2,029,491 IN SUIT".²

On page 4 of appellant Lane-Wells' brief is made the dogmatic statement that the "only reason given in the Court's conclusions of law for finding non-infringement" was the fact that the patent must be limited to the precise device shown in the patent only because no apparatus for practical use had been built and commercially used following the teachings of the patent. Then the appellant Lane-Wells proceeds to base its entire brief on this one false premise. That this premise is false is clearly demonstrated by the fact that the Court found as a fact (R. 69, Finding 78):

"The accused apparatus is substantially different in construction and mode of operation from the apparatus disclosed in the Lane patent No. 2,029,491 in suit."

and then in its Conclusions of Law (R. 72, Conclusion 11) concluded as follows:

¹Conclusion No. 11, R. 72.

²Finding of Fact No. 78, R. 69.

“The accused apparatus being substantially different both in construction and mode of operation from that disclosed in the Lane patent No. 2,029,491 in suit, a charge of infringement cannot be sustained.”

Therefore, the district judge clearly followed not only the law of this circuit, but the law of infringement as it has been laid down since before the turn of the century.

It always has been the rule that to sustain a charge of infringement, there must be *identity of result, identity of the means of attaining that result, and identity of mode of operation*.

In the case of *McDonough v. Johnson-Wentworth Co.*, 30 Fed. (2d) 375, at 383, the Circuit Court of Appeals for the Eighth Circuit said to the test of infringement:

“* * * To sustain the charge of infringement the infringing device must be substantially identical with the one alleged to be infringed in (1) the result attained; (2) the means of attaining that result; and (3) the manner in which its different parts operate and cooperate to produce that result. If the devices are substantially different in either of these respects the charge of infringement is not sustained. (Citing cases.)”

This rule is the same as in this circuit as quoted by Judge Morrow in *American Can Co. v. Hickmott Asparagus Canning Co.*, 137 Fed. 86, in which on pages 88 and 90, respectively, he said:

“In a patented combination, a device in one mechanism, to be the equivalent of a device in another, must perform the same function (*Rowell v. Lindsay*, 113 U.S. 97, 103, 104, 5 Sup. Ct. 507, 28 L. Ed. 906), and perform that function in substantially the same manner, as the thing of which it is alleged to be an equivalent.

* * * * *

“To sustain a claim of infringement of a patented machine, three things must be found: First, identity of result; second, identity of means; third, identity of operation. * * *”

This Court of Appeals, in holding non-infringement in *Wilson & Willard Mfg. Co. v. Union Tool Co.*, 249 Fed. 729, continued to follow the same rule as to infringement (at p. 731):

“To make one mechanical device the equivalent of another, it must appear, not only that it produces the same effect, but that such effect is produced by substantially the same mode of operation. * * *”

This Court again in *Pacific States Electric Co. v. Wright* (C.C.A. 9), 277 Fed. 756, in holding the patent sued upon to be not infringed, said:

“* * * And it is well settled law that, if the device embodied in the appellant’s patent can be substantially differentiated from that of the appellee, the charge of infringement cannot be maintained. (Citing cases.)”

Where the mechanism of the alleged infringing device and the device of the patent differ in mode of operation, there can be no infringement. This is set

out in *Measuregraph Co. v. Grand Rapids Show Case Co.* (C.C.A. 8), 29 Fed. (2d) 263, where the Court, in holding a claim expressed broadly in terms of "means" not infringed, said, on page 277:

"* * * The problem was approached in a different way by Vanderveld and he solved it on a different mechanical principle from that disclosed by Hosch and Turner. His mechanism is simple, it embodies a different mode of operation and it is operated in a different way. There is no substantial identity in the means used, but substantial difference between them, and though the purpose to be accomplished and the ultimate results obtained may be the same, this does not constitute infringement. * * *"

Therefore, the District Court was correct and in full accord with the authorities in its Conclusions of Law No. 9 and No. 11 (R. 72):

"9. To sustain a charge of infringement of a patented apparatus, there must be found in the accused apparatus substantial identity of result, substantial identity of means, and substantial identity of mode of operation."

* * * * *

"11. The accused apparatus being substantially different both in construction and mode of operation from that disclosed in the Lane patent No. 2,029,491 in suit, a charge of infringement cannot be sustained."

Inasmuch as the finding of fact¹ upon which these conclusions are based is supported by substantial evi-

¹Finding of Fact No. 78, R. 69.

dence² and no contrary evidence exists, and inasmuch as the question of infringement is a question of fact, the District Court's judgment of non-infringement should not be disturbed. (*Ralph N. Brodie Co. v. The Hydraulic Press Mfg. Co.*, 151 Fed. (2d) 91.)

THE DISTRICT COURT NARROWLY CONSTRUED THE CLAIMS ALSO BECAUSE OF THE FACT THAT NO APPARATUS FOR PRACTICAL USE CONSTRUCTED ACCORDING TO THE PATENT HAS EVER BEEN BUILT AND COMMERCIALY USED AND THE REASONS FOR SUCH LACK OF USE UNDOUBTEDLY INFLUENCED THE COURT IN PLACING SUCH A NARROW CONSTRUCTION ON THE PATENT CLAIMS.

The Court in limiting the claims of the Lane patent to the apparatus illustrated and described by the specifications was influenced so to do by the fact that no such apparatus for practical use has ever been built and commercially used, for the reason *that the Court believed that an apparatus such as disclosed in the patent was of no practical benefit to the industry.* This is definitely and clearly established by Finding of Fact No. 34 (R. 59) of the District Court which states:

“Under normal and usual circumstances as described above in findings Nos. 25-30, the device of the Lane patent in suit, as disclosed therein, would be impractical in industry to recover and bring to the surface of the well a beneficial test sample, without the additional use of other auxiliary

²Testimony of Witness O'Neill on mode of operation of accused apparatus (R. 215-273); on construction and mode of operation of the device of the patent (R. 320-348).

equipment or devices and operations not described or illustrated in the patent, and by a mode of operation not described or illustrated in the patent.”

The reason that the device of the patent in suit is inoperative and impractical as illustrated and described in the patent is that the ball valve 28 (on the drawings of the patent and in the specification thereof) is intended to operate to prevent mud fluid from entering the tester when the packer of the tester is unseated. That ball valve 28 will not so function and consequently the amount of mud which will enter the patented device and its tubing, if it is attempted to elevate such sample to the surface, will be many times the amount of the sample taken into the device and manifestly render such sample useless for any practical purpose. In this regard, the Court found (R. 59):

“32. In the Lane patented device the ball valve 28 will not function to prevent mud fluid from entering the tester when the packer is unseated in normal use of a tester in the oil fields, as described above in findings Nos. 25-30.

“33. Under normal conditions, as described above in findings Nos. 25-30, the amount of mud fluid which will enter the Lane device and its tubing after releasing the packer will be many times the amount of the sample taken into the device and its tubing from the formation.*

*The above Findings are supported by the uncontradicted testimony of the witness Barton at R. 364-367 and the witness O'Neill at R. 326-327, 332, 336-348.

“34. Under normal and usual circumstances as described above in findings Nos. 25-30, the device of the Lane patent in suit, as disclosed therein, would be impractical in industry to recover and bring to the surface of the well a beneficial test sample, without the additional use of other auxiliary equipment or devices and operations not described or illustrated in the patent, and by a mode of operation not described or illustrated in the patent.

“35. The Lane patent in suit fails to disclose a device which is of any practical benefit to the oil industry unless additional auxiliary devices or equipment not described or illustrated in the patent are used in connection therewith, to remove the sample from the device and elevate the sample to the surface of the well.”

From these findings of fact, it is manifestly clear, and the evidence is uncontested and uncontradicted, that the apparatus disclosed in the patent will not by itself constructed and operated as shown in the patent, be capable of producing at the surface of the well a sample which would be of any use at all. In this regard, see the testimony of the unbiased witness Barton, who testified (R. 362) that he was a petroleum engineer with a bachelor of science degree, and was employed by the State of California as senior oil and gas engineer for the last nineteen (19) years.

His testimony on the patent is that if the mud or well fluid can enter the tester following the path of the sample, as set forth in findings of fact Nos. 32 and 33 above set out, that such a tool would be of no prac-

tical benefit in testing a well. His testimony follows (R. 364, 365, 366):

“Q. Speaking of a Johnston tester without the gun, Mr. Barton, and assuming that in a tool of that character no means is provided to exclude the well fluid from entering the tool following the same path that the sample entered in the tool, so that the fluid in the tool and in its tubing always equalized with the mud fluid in the well, in your opinion would or would not such a tool be of any practical benefit in testing a well for water shut-off?

* * * * *

“The Witness: My answer to that would have to be no.

“Q. (By Mr. Mellin): And would you state your reasons for your answer, Mr. Barton?

“A. Well, in testing a water shutoff on a string of casing that has been cemented in the well, it is necessary to obtain a sample of fluid which comes into the drill pipe or tubing during the time the valve is open, and which is below the point at which the packer is set. If the fluid behind the drill pipe or tubing were allowed to be equalized after the packer was released, it would be impossible to identify the character of the fluid which entered during the time the valve was open.

“Q. Have you finished your answer, Mr. Barton?

“A. Yes.

“Q. Now, in making a water shutoff test by a tester of the type of the Johnston formation tester, assuming that the packer is tight and set and the tool is open to take a sample, and there-

after the packer is released and the mud fluid in the well under the hydrostatic head has free access to flow into the tool following the taking of the test sample, and the fluid in the tool equalized with the mud fluid in the well bore, in your opinion would or would not such a test be of any practical benefit in determining whether or not a water shutoff had or had not been effected?"

"A. No."

Therefore, having determined that the patent added nothing practical to the art, the Court was correct in construing the patent as narrowly as it possibly could, and obviously when so construed, there could be no infringement by the accused apparatus.

That the Court followed the well established rules of construing patent claims is evident from the authorities hereinafter quoted.

This Court similarly so limited claims in the case of *McRoskey v. Braun Mattress Co.* (C.C.A. 9), 107 Fed. (2d) 143:

"Whether the mattress depressing members of the frames described in the claims are conical-shaped or not, the claims do not state, but, since conical-shaped mattress depressing members are the only ones mentioned in the specification, it must be assumed that the mattress depressing members of the frames described in the claims are likewise conical-shaped. For the claims must be read in the light of the specification. *Henry v. Los Angeles*, 9 Cir., 255 F. 769, 780."

See also:

Holtzer-Cabot Electric Co. v. Standard Electric Time Co. (C.C.A. 1), 111 Fed. (2d) 71.

“The plaintiff and defendant attain the same result, but they do it through different means and in different ways. The defendant’s device is not a copy of the thing described in the specification of the patentee, nor is it in substance the same thing. *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650. This is not infringement. To find infringement it must be demonstrated that substantially the same means are employed to accomplish the same result. *E. Van Noorden Co. v. Cheney Co.*, 1 Cir., 75 F. 2d 298; *McDonough v. Johnson-Wentworth Co.*, 8 Cir., 1928, 30 F. 2d 375.

* * * * *

“The law is well settled that claims must be construed in the light of the specification and drawings. *Nash Engineering Co. v. Cashin*, 1 Cir., 13 F. 2d 718; *American Fruit Growers, Inc. v. Brogdex Company*, 283 U.S. 1, 51 S. Ct. 328, 75 L. Ed. 801.”

See also:

Carl Braun, Inc. v. Kendall-Lamar Corporation (C.C.A. 2), 116 Fed. (2d) 663.

“* * * and as the ‘means’ of the defendant for advancing the cans to cover receiving position is merely that of the prior art it can’t be held the equivalent of the ‘means’ of the claims which are shown by the specifications to be substantially different from that. Where general language is used in a claim it is always to be read as limited by what is new as a patentable advance as shown by the specifications. *Baker Perkins Co. v.*

Thomas Roulston, Inc., 2 Cir., 62 F. 2d 509; Electro Dynamic Co. v. United States Light & H. Corp., 2 Cir., 278 F. 80. Infringement is not proved simply by the language used in a claim without regard to the specifications. It must be proved by showing that the claim covers what is alleged to infringe when the claim is read upon the specifications which describe the invention. Grubman Engineering & Mfg. Co. v. Goldberger, 2 Cir., 47 F. 2d 151; McRoskey v. Braun Mattress Co., 9 Cir., 107 F. 2d 143; Henry v. City of Los Angeles, 9 Cir., 255 F. 769.”

THE QUESTION OF INFRINGEMENT IS NOT A VERBAL QUESTION AND CANNOT BE DETERMINED BY THE TEST OF THE WORDS USED IN THE CLAIMS OF THE PATENT IN SUIT.

The District Court, in limiting the claims to an apparatus having the construction and mode of operation described and illustrated in the specifications, impliedly held that if Lane (patentee) invented anything, it was an apparatus of that particular construction and mode of operation. Consequently, the District Court, then finding that the accused device was entirely different both in construction and mode of operation, correctly found no infringement in fact or in law. That the words of the claims read literally upon the accused apparatus is immaterial under such circumstances. Infringement is not determined by test of the words used in the claims.

The leading authority upon this point is the decision of the United States Supreme Court in *Westinghouse*

v. Boyden, 170 U. S. 537, from which the following is quoted:

“The patentee may bring the defendant within the letter of his claims, but if the latter has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent his actual invention, he is as little subject to be adjudged an infringer as one who has violated the letter of a statute has to be convicted, when he has done nothing in conflict with its spirit and intent.”

This Court of Appeals recognized and approved this rule in *Grant v. Koppl*, 99 Fed. (2d) 106:

“We note that appellant contends that the claims of the patent in suit read upon appellees’ device. We may assume that this is true, especially as to claim 9. But infringement is not a mere matter of words. (Citing cases.)”

This rule is uniformly followed:

In *Electro-Dynamic Co. v. U. S. Light & Heat Corp.* (C.C.A. 2), 278 Fed. 80, 84, Judge Hough wrote:

“It is no longer necessary to multiply citations to show that claims are to be construed in the light of the contribution to knowledge actually made by the inventor, or that mere ability to fit to a thing the words of a claim does not prove infringement. Let it be assumed that (e.g.) the first claim, at least, will ‘read on’ defendant’s system; it remains to inquire whether that (and other) claims, construed consistently with the pat-

entee's actual achievement, justify the finding that there has been that substantial appropriation which is always the essence of the tort known as infringement."

CONCLUSION.

We therefore respectfully point out to the Court that the District Court having found as a fact upon substantial and uncontradicted evidence that the patented device and the accused apparatus are entirely different in construction and entirely different in mode of operation, that no infringement could be found either as a matter of fact or as a matter of law.

We also submit that the District Court correctly applied the rules of construction in narrowly construing the claims in the light of the specification to be limited to the precise apparatus there disclosed, and as so limited were not infringed by the accused apparatus. Further, that the Court was correct in so limiting the claims when it found as a fact that the apparatus of the patent added nothing of practical benefit to the art, and in fact found that the device of the Lane patent in suit, as disclosed therein, would be of no practical benefit to the oil industry unless additional auxiliary devices or equipment not described or illustrated in the patent are used in connection therewith, to remove the sample from the device and elevate the sample to the surface of the well.

We respectfully urge that the District Court committed no error in finding and adjudging that the accused apparatus did not infringe the patent in suit.

Dated, San Francisco, California,

April 4, 1949.

Respectfully submitted,

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No. 11,965

IN THE

United States Court of Appeals
For the Ninth Circuit

M. O. JOHNSTON OIL FIELD SERVICE
CORPORATION,

Appellant,

vs.

LANE-WELLS COMPANY, a corporation,
Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT,
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IN THE

**United States Court of Appeals
For the Ninth Circuit**

M. O. JOHNSTON OIL FIELD SERVICE
CORPORATION,

Appellant,

VS.

LANE-WELLS COMPANY, a corporation,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT,

M. O. JOHNSTON OIL FIELD SERVICE CORPORATION.

PRELIMINARY.

This brief is appellant Johnston's reply to appellee Lane-Wells' answering brief. We respectfully submit, as pointed out further on herein, that each and every of appellee Lane-Wells' contentions is fully refuted by the evidentiary findings of fact of the District Court, and that in view of these evidentiary findings of fact, that the District Court erred in concluding that the patent in suit is valid and that it disclosed a device embodying invention.

We wish to point out that even in its ultimate conclusions or "findings" of "invention" and "validity", the District Court expressed doubt. For example, in conclusion 4:

"Although doubt exists whether the device of the Lane patent in suit involves more than a mere aggregation of old elements which produce a result not different in kind * * *

and in conclusion 5

“While it is doubtful whether, in effecting the combination of perforator and tester, more than the ingenuity involved in the work of a mechanic skilled in the art was called into play * * *”

and in conclusion 6

“Although doubt exists whether the Lane patent in suit describes and claims the alleged invention with the definiteness and specificity required by R. S. § 4888 * * *”

We say that in view of the evidentiary findings of fact where the Court was in no doubt, the Court could properly come to but one conclusion, and that was lack of “invention” and “invalidity”, as we pointed out in our opening brief and as we will point out in answering the contentions of the appellee Lane-Wells.

APPELLEE LANE-WELLS’ CONTENTIONS ON PAGE 3 OF ITS BRIEF 1. “The Lane patent in suit is not for an aggregation but a true combination and is valid.” 2. “The combination of elements of the Lane patent claims accomplishes results that are better than and different from the results of the operation of the elements used separately.” **ARE BASED UPON A SMALL ISOLATED PORTION ONLY OF THE FINDINGS OF FACT WHICH WHEN TAKEN ALONE IS MISLEADING.**

Both of the above contentions are based on the Court’s conclusion of law 4 (Tr. 70) and finding of fact 42 (Tr. 61) (taken alone), which finding of fact appellee Lane-Wells says is to the effect that the combined gun perforator and formation tester such as disclosed in the Lane patent will obtain a formation sample such as cannot be obtained where the gun perforator and formation tester are used separately. However, when this finding is read in conjunction with companion findings (which are not referred to by

appellee Lane-Wells in its brief), an entirely opposite picture is presented which is that *the difference in the formation sample so obtained is immaterial*. We quote the following findings of fact (Tr. 62):

“43. In perforating a well casing and making a production test, by separately running a formation tester and perforating gun, the time elapsed between perforating and testing will permit an additional small amount of filtrate water to penetrate into the oil sands immediately surrounding the perforations.

44. In running a perforator gun and a tester separately, where a sample of the formation fluid is obtained in the tester, the amount of filtrate water in the test sample would be from approximately one to five per cent more than would be obtained by running the tester and perforating gun together.

45. When a sample of the native formation fluid is obtained in the tester, an increase of one to five per cent in the amount of filtrate water taken into the tester with said sample would not normally have any disadvantageous effect as far as the efficiency of the test is concerned, in determining the nature and characteristics of the native formation fluid.”

From the above findings of fact 43, 44 and 45, taken in connection with finding of fact 42, the latter being the one upon which appellee Lane-Wells bases its argument, it is found that although the sample taken may be different, the difference is entirely immaterial as far as the effectiveness and character of the test is concerned.

Thus, when all of the Court's findings of fact 42, 43, 44 and 45 are read together, appellee Lane-Wells'

above-quoted contentions are shown to be based upon distortion of the findings and are without factual foundation.

In that appellee Lane-Wells' factual premise as to the above contentions has no sound basis, the authorities cited are not in point and of no aid to appellee Lane-Wells.

APPELLEE LANE-WELLS' CONTENTION ON PAGE 7 OF ITS ANSWERING BRIEF "It is not necessary to use a bailer or swab with the gun perforator and formation tester of the Lane patent, but if a bailer or swab is used, a more representative sample is secured than is secured by the use of the gun perforator and formation tester separately" **IS DIRECTLY CONTRARY TO THE FINDINGS OF FACT.**

Appellee Lane-Wells, in support of the above contention, says (page 7 of appellee Lane-Wells' brief): "a more representative sample is secured than is secured using the gun perforator and formation tester separately for the reasons set forth in the preceding section (1)." As stated under our preceding heading, the Court found as a fact that no better test is secured. See Findings of Fact Nos. 43, 44 and 45 (Tr. 62) reproduced on the preceding pages herein.

Further, unless a bailer or swab is used (and how so to do is not described in the patent), a sample entering the device of the Lane patent in suit cannot be removed to the surface. The Court so found; see Findings of Fact Nos. 35 and 36 (Tr. 59 and 60):

"35. The Lane patent in suit fails to disclose a device which is of any practical benefit to the oil industry, *unless additional auxiliary devices or equipment not described or illustrated in the patent are used in connection therewith, to remove the sample from the device and elevate the sample to the surface of the well.* (Italics ours.)

36. The only operation which the device described and illustrated in the Lane patent has by itself, and with the mode of operation as set forth in that patent, would be the ability to be lowered into a well bore, set the packer to divide the well bore into an upper and lower zone, fire a perforating bullet through the well casing, and permit a sample to enter the tester; *and such patent does not describe or illustrate any means or method for removing the sample from the tester to the surface of the well when making a test under normal and usual conditions, as described above in findings Nos. 25-30.*" (Italics ours.)

Thus the very findings of fact fully refute appellee Lane-Wells' contention (above) "It is not necessary to use a bailer or swab with the gun perforator and formation tester of the Lane patent." It certainly is if one wishes to recover a sample in the normal testing of oil wells.

APPELLEE LANE-WELLS' CONTENTION ON PAGE 7 OF ITS BRIEF "The combined gun perforator and formation tester of the Lane patent saves time, and hence expense, by securing a formation sample more quickly than it can be secured by the use of a gun perforator and formation tester separately" IS DIRECTLY CONTRARY TO THE FINDINGS OF FACT.

Obviously, it is true that in a device such as the accused apparatus, wherein the sample can be elevated to the surface directly in the device, time saving is normally effected over the separate running of a gun and a tester, *but this is not true of the patented device as the Court found as a fact, for the reason that in order to recover the sample from the device of the patent in suit, it is necessary to remove the sample by means of bailers, swabs or other apparatus not mentioned or described in the patent and by a mode of operation not found in the patent.* We refer the Court to finding of fact 37 (Tr. 60):

“37. If the Lane device were employed to make a test and separate instrumentalities, such as bailers, were required to remove the test sample from the device so that the sample may be brought to the surface, *as much time would be required*, under the conditions described above in findings Nos. 25-30, *to make the test and recover such sample as would be required by the use of a separate perforating gun and formation tester.*” (Italics ours.)

We also refer this Court to findings of fact 35 and 36 (Tr. 59-60), wherein the Court found that the device of the Lane patent can not function to recover and elevate a test sample, and, therefore, separate instrumentalities must be used to remove the test sample from the device of the patent in suit and elevate it to the surface. Therefore, appellee Lane-Wells' contention above referred to is based upon a false premise and is directly contrary to the actual findings of fact of the District Court. Consequently, the cited authorities are not in point.

APPELLEE LANE-WELLS' CONTENTION ON PAGE 14 OF ITS ANSWERING BRIEF “That the packer, gun perforator, and formation tester in the combined tool perform their inherent functions and are individually old does not detract from the patentability of their combination; otherwise no valid patent on a combination of old elements could exist” **TOTALLY IGNORES THE APPLICABLE FACTS AND LAW.**

Certainly, where old elements so cooperate as to modify the function of each other and thereby produce a new and different result, patentable combination can exist. This is not the case in the present instance (when the claims are measured by the accused device), because the Court found as fact that in the accused apparatus no such cooperation and modification of functions resulted, because the tester and the gun each separately operate in its old manner to perform its

old function to produce its same old result that they separately perform when run into a well bore separately (Tr. 66):

“66. When the Johnston Formation Tester and the Johnston Perforator Gun are connected together and lowered in a well bore for operation, they are each separately operated to perform exactly the same function in the same manner that they perform when run into a well bore separately.

67. In the use of the accused apparatus, the Johnston Perforating Gun is screwed to the bottom of the Johnston Formation Tester and the two are lowered into the well bore simultaneously, and upon reaching the point of testing, the Johnston Perforator Gun is operated and fired in precisely the same manner that it is operated and fired when it is run into a well casing for perforating without a Johnston Formation Tester; and after firing the accused apparatus is elevated in the well bore and then the packer of the Johnston Formation Tester is set and the Johnston Formation Tester in all respects is operated precisely as it is operated when it is run into a well bore for making a test without the Johnston Perforator Gun connected therewith.

68. When a perforating gun is connected to the lower end of a formation tester or sample receiver to be run into a well bore or well casing simultaneously, the operation of the gun does not change or modify the operation of the formation tester or sample receiver, and the operation of the formation tester or sample receiver does not change or modify the operation of the perforating gun.

69. When a perforating gun is connected to the lower end of a formation tester or sample receiver to be run into a well bore or well casing simultaneously, each device separately operates

in its old accustomed manner, and there is no change in the operation of either, save and except the length of the time interval between the operation of the two devices.”

Therefore, the Lane claims, measured by these findings of fact under the law cited in our opening brief (page 25), must be found to define nothing but a pure aggregation and not a patentable combination. Manifestly, the contention made by appellee Lane-Wells quoted above is based upon a factual situation not present in the case at bar and the cited supporting authorities are not in point.

ON PAGE 17 OF APPELLEE LANE-WELLS' ANSWERING BRIEF IT MAKES THE CONTENTIONS “The Lane patent is for a combination of mechanical elements, not an ‘abstract idea,’ and is valid. A. The claims of the Lane patent in issue define, not an ‘abstract idea,’ but a combination of mechanical elements and their physical and cooperative relationship.” THIS CONTENTION IS CONTRARY TO THE POSITION WHICH APPELLEE LANE-WELLS MAINTAINED AT THE TRIAL OF THE CASE AND CONTRARY TO THE DISTRICT COURT’S OPINION.

During the trial of the case, the following colloquy occurred between counsel for appellee Lane-Wells, the Court, and the witness O’Neill:

“The Court. Perhaps we can save time on claim 7, Exhibit 1.¹ Does the defendant² claim it means any particular type of packer or does it mean any packer that will serve the purpose—any packer that will function as a packer?

Mr. Foster. Any packer that will function as a packer for the purposes described in the patent, yes, your Honor.

The Court. There is no invention claimed in the packer itself?

Mr. Foster. No, sir.

The Court. Doesn’t that meet the question?

¹The Lane patent in suit.

²The appellee Lane-Wells.

Mr. Mellin. That would as to one element.

The Court. As far as claim 7 is concerned.

Mr. Mellin. Claim 7 goes on, your Honor:

‘In combination; a packer adapted when set to divide a well casing into upper and lower zones; and a gun means suspended from said packer in said lower zone; said gun means arranged to drive a projectile through the surrounding well casing.’ I should like to, and I think I am entitled to ask the witness whether or not that describes, that description of the gun means describes to him any particular gun means or all gun means capable of accomplishing that function.

The Court. *I will sustain the objection upon the ground it is clear to me. It does not describe any particular means.* I do not need an expert on that.” (Italics ours.)

From the above it is evident that what appellee Lane-Wells contends is the patented invention is the combination of *any gun, any packer, and any tester regardless of its mechanical structure or mode of operation*. Under the cases cited in our opening brief, and particularly the cases cited by appellee Lane-Wells, to-wit, *Killefer Mfg. Co. v. Dinuba Associates, Ltd.*, 67 Fed. (2d) 362 (C.C.A. 9), and *R. G. Le Tourneau, Inc. v. Garwood Industries, Inc.*, 151 Fed. (2d) 432 (C.C.A. 9), together with the case of *Knapp v. Morse*, 150 U.S. 221, 14 S. Ct. 81, such claims are for an abstract idea of “combination” and are repugnant to the well-established rules of law. To be valid, claims of a patent must define the invented device by the constructional characteristics of its elements and not merely by the function of such elements. Obviously the claims of the patent do not do so and are therefore invalid because they claim merely an abstract idea (see our opening brief chapters commencing on pages

14, 17 and 60) and are functional, vague, indefinite and do not comply with R.S. 4888.

THE CONTENTION OF APPELLEE LANE-WELLS ON PAGE 19 OF ITS BRIEF "The law applicable to the facts here presented is that a new combination of old mechanical elements accomplishing a new and better result or an old result in a more facile, economical, and efficient manner is a patentable combination" **ASSUMES THAT THE DEVICE OF THE LANE PATENT ACCOMPLISHES A NEW AND BETTER RESULT OR AN OLD RESULT IN A MORE FACILE, ECONOMICAL AND EFFICIENT MANNER, AND TO THIS EXTENT IS CONTRARY TO THE FINDINGS OF FACT BY THE DISTRICT COURT.**

We have already pointed out that in findings of fact 42, 43, 44 and 45 (Tr. 61 and 62) the District Court clearly found that no new or better result was obtained by the patent device. In the following quoted findings of fact the Court clearly found that the device of the Lane patent in suit did not even accomplish an old result in a more facile, economical or efficient manner (Tr. 59 and 60):

"35. The Lane patent in suit fails to disclose a device which is of any practical benefit to the oil industry, unless additional auxiliary devices or equipment not described or illustrated in the patent are used in connection therewith, to remove the sample from the device and elevate the sample to the surface of the well.

36. The only operation which the device described and illustrated in the Lane patent has by itself, and with the mode of operation as set forth in that patent, would be the ability to be lowered into a well bore, set the packer to divide the well bore into an upper and lower zone, fire a perforating bullet through the well casing, and permit a sample to enter the tester; and such patent does not describe or illustrate any means or method for removing the sample from the tester to the surface of the well when making a test under

normal and usual conditions, as described above in findings Nos. 25-30.

37. If the Lane device were employed to make a test and separate instrumentalities, such as bailers, were required to remove the test sample from the device so that the sample may be brought to the surface, *as much time would be required, under the conditions described above in findings Nos. 25-30, to make the test and recover such sample as would be required by the use of a separate perforating gun and formation tester.*" (Italics ours.)

Therefore, the law cited by appellee Lane-Wells is inapplicable to the facts in the case at bar as set forth in the Court's findings of fact.

APPELLEE LANE-WELLS' CONTENTION ON PAGE 21 OF ITS BRIEF "The combination of the Lane patent is useful and the patent is valid" **CANNOT BE SUSTAINED AS A MATTER OF LAW IN VIEW OF THE EVIDENTIARY FINDINGS OF FACT OF THE DISTRICT COURT.**

For example, we quote finding of fact 35 (Tr. 59):

"35. The Lane patent in suit fails to disclose a device which is of any practical benefit to the oil industry, unless additional auxiliary devices or equipment *not described or illustrated in the patent* are used in connection therewith, to remove the sample from the device and elevate the sample to the surface of the well." (Italics ours.)

We have pointed out in our opening brief (page 49) that if the apparatus of the patent will not accomplish the result without the addition or subtraction to the apparatus disclosed, the patent is invalid (citing *O'Reilly v. Morse* (Telegraph Case), 15 How. 62, 56 U.S. 62, 14 L. Ed. 601; *Mitchell v. Tilghman*, 86 U.S. 287, 19 Wall. 287, 22 L. Ed. 125; *Beidler v. United States*, 253 U.S. 447, 453 (1920), 40 S. Ct. 564; *Houston v. Brown Mfg. Co.*, 270 Fed. 445, at

448; *Permutit Co. v. Graver Corporation*, 284 U.S. 52, 52 S. Ct. 53; *Special Equipment Co. v. Ooms*, 153 Fed. (2d) 121).

Appellee Lane-Wells refuses in its brief to meet this contention head-on by pointing out where in the patent there is any teaching of how to use a bailer or other apparatus to remove the sample from the tool after it is collected therein, or to point out where in the patent it teaches or states that such additional apparatus is necessary. Further, appellee Lane-Wells fails to point out in its brief where in the patent it tells or teaches how to use a "bean" so that a sample can be taken by the tool of the patent. Thus, appellee Lane-Wells fails completely to take the patent out of the rule of law stated in *O'Reilly v. Morse* (Telegraph Case), 15 How. 62, 56 U.S. 62, 14 L. Ed. 601, in which the Court stated:

"The provisions of the Acts of Congress in relation to patents may be summed up in a few words.

Whoever discovers that a certain useful result will be produced, in any art, machine, manufacture or composition of matter, by the use of certain means, is entitled to a patent for it; *provided he specifies the means he uses in a manner so full and exact, that anyone skilled in the science to which it appertains, can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he described. And if this cannot be done by the means he describes, the patent is void.*"

Thus, appellee Lane-Wells in urging by its argument that the apparatus of the patent will function to some extent, but without a saving of time; without obtaining a better sample in a more efficient, facile or economical manner, by the use of apparatus, tools and

modes of operation not even mentioned in the patent, condemns its own patent to the death of invalidity.

APPELLEE LANE-WELLS' CONTENTION ON PAGE 22 OF ITS BRIEF "B. The record establishes that the combined gun perforator and formation tester of the Lane patent can successfully secure a sample of the formation liquids. The Court, in part of its finding 31, states: 'A satisfactory sample could possibly be secured by adding a liquid cushion above the sample in the Lane apparatus before the packer is released and by employing a bean at the surface of the ground, thus controlling the rate of inflow of the mud to the apparatus after the packer is unseated.' (Tr. 59)" **EMPHASIZES THE INVALIDITY OF THE PATENT.**

As stated under the preceding chapter in this brief, no where in the patent does it even mention the use of a "bean" or a "liquid cushion", or how one can employ a "bean" to obtain the result mentioned. Consequently the patent is invalid for failure to describe such additional apparatus or new mode of operation. Certainly, if a "bean" must be employed or a "cushion" (just how such can be employed we do not know, and the record does not tell us, *and the patent does not tell us*), to make the device of the patent operative to a limited extent, such employment manifestly would require a mode of operation of the patented device entirely foreign to and different from that described in the patent itself. *This by itself is proof of invalidity of the patent under the authorities cited in connection with the previous section.*

APPELLEE LANE-WELLS' CONTENTION ON PAGE 24 OF ITS BRIEF "C. A patent is not invalid for lack of utility because the embodiment of the invention it illustrates and describes is not the best commercial form or requires changes or additions or the use of other devices known in the art" **IS WITHOUT MERIT IN LAW.**

This contention is fully answered in the chapter of our opening brief commencing on page 44 thereof. Further, the argument of appellee Lane-Wells under this contention completely ignores the rules of law

requiring that the patent itself *must define the use of all apparatus necessary to its operation* as well as the mode of operation thereof.

The necessary use of additional devices to make the patented device operate, even assuming such additional devices are known in the art, would require giving the patented device a different mode of operation entirely foreign to that described in the patent.

This spells invalidity; see page 44 of our opening brief and pages 4-5 of this brief.

APPELLEE LANE-WELLS' CONTENTION ON PAGE 29 OF ITS BRIEF "E. Plaintiff has paid tribute to the utility of the claimed invention by appropriating it" IS WITHOUT FOUNDATION.

In the first place, appellant Johnston can not be deemed to have appropriated the device of the patent in suit because the Court found as a fact and as a matter of law that *the accused apparatus does not infringe the Lane patent in suit* (finding 77—Tr. 69). Further, the Court found as a fact (findings 78 and 79—Tr. 69) that the accused apparatus is substantially different in construction and mode of operation from the apparatus disclosed in the Lane patent in suit, and that the results obtained by the accused apparatus are obtained by a mode of operation substantially different from the mode of operation disclosed in the Lane patent in suit. Therefore, there is no basis for appellee Lane-Wells' contention that appellant Johnston has appropriated the device of the patent in suit.

Secondly, for the reasons just stated there is no basis for the appellee Lane-Wells' above quoted statement that plaintiff *admitted paying tribute to the utility of the claimed invention by appropriating it*. We defy appellee Lane-Wells to substantiate any such inference or concession from the record.

APPELLEE LANE-WELLS' CONTENTION ON PAGE 30 OF ITS BRIEF "F. Industry has paid tribute to the utility of the claimed invention by paying royalty for its use" SHOWS THE RIDICULOUS LENGTH TO WHICH THIS APPELLEE LANE-WELLS WILL GO IN ORDER TO ATTRIBUTE MERIT TO THE INVENTION OF THE PATENT IN SUIT.

The license agreement referred to was entered into over a year and a half after this suit was filed. In fact, the license agreement was entered into after the start of the trial of this cause in the District Court, which trial commenced on July 15, 1947, and after the taking of some testimony was recessed until November 25, 1947. Therefore, the license agreement referred to by appellee Lane-Wells to support the above contention was entirely incompetent, immaterial and irrelevant, and should not have been admitted over appellant Johnston's objection. In spite of its admission, it still is of no probative value in showing public acquiescence or payment of tribute to the patent in suit. To rely upon it for comfort, appellee Lane-Wells indeed must be desperate for props for its totally invalid patent.

RE APPELLEE LANE-WELLS' CONTENTIONS ON PAGES 32 AND 33 OF ITS BRIEF "The claims of the Lane patent are definite, comply, with R. S. 4888, and are valid. A. The Court so specifically held in its conclusion 6 (Tr. 71) and also generally so held in its conclusions of validity numbered 4, 5 and 7 (Tr. 70, 71). B. Plaintiff and its counsel clearly understood the claims of the Lane patent. C. Plaintiff's expert clearly understood the claims of the Lane patent. D. The doctrine of the Halliburton case does not apply to the claims of the Lane patent." ARE UNSUPPORTED BY THE RECORD.

With respect to "A" above, the Court only held the claims valid *if* they were limited to the precise apparatus disclosed in the patent in suit. This is clear from the conclusions of law of the Court 7 and 8, wherein the Court held that the claims must be in-

terpreted to be limited to the precise device shown in the patent. Obviously, the Court would not have so limited the claims, had it been able to find them valid without such limitation.

Appellant Johnston admits that plaintiff and its counsel clearly understood the claims of the Lane patent as did the witness O'Neill, because it was clear to both plaintiff, its counsel and the witness O'Neill, as well as to the District Judge, that the claims attempted to cover any combination of a packer of any type, construction or mode of operation with a perforating gun of any type, construction and mode of operation, and a formation tester of any type, construction and mode of operation, regardless of how the three were assembled together. That the District Judge clearly so understood the patent claims is obvious from his statement to that effect set forth on pages 8-9 of this brief.

Therefore, appellee Lane-Wells' contentions above set out are without merit and without support in the record.

APPELLEE LANE-WELLS' CONTENTIONS ON PAGE 38 OF ITS BRIEF "The Lane patent is for a combination involving the inventive faculty, more than mechanical skill, and is valid. B. The Court's findings with respect to the Johnston accused tool are in no way inconsistent with invention being involved in the Lane patented device." ARE DIRECTLY CONTRARY TO THE COURT'S ACTUAL FINDINGS IN THE MATTER.

The District Court found as a fact that connecting the Johnston Formation Tester, which had been long separately used to make formation tests, with the Johnston Perforator Gun, which had been separately used to perforate well casing (perforator guns for such purposes being old in the art long prior to appellee Lane-Wells' patent as is the case with the test-

ers), required only mechanical skill. We quote the following findings (Tr. 66-64):

“63. The Johnston Formation Tester, which forms a part of the accused apparatus, is capable of, has been, and is now used separately from any other apparatus to test the formation penetrated by well bores by sampling the same.

64. The Johnston Perforating Gun, which is used as a part of the accused apparatus, is also capable of and is used separately from a testing tool or formation tester to perforate well casings in place in a well bore.

65. No structural modification was necessary, either in the Johnston Formation Tester or the Johnston Perforator Gun, in order to connect them together to form the accused apparatus.”

* * * * *

“58. It required only mechanical skill to perform the act of connecting the Johnston Formation Tester to the Johnston Perforating Gun to produce the accused apparatus.”

In view of these findings of fact, there is no legal basis upon which to support appellee Lane-Wells' contentions above quoted.

ON PAGE 45 OF ITS BRIEF APPELLEE LANE-WELLS MAKES THE CONTENTION THAT THE DISTRICT COURT'S ULTIMATE FINDING THAT THE LANE PATENT IS VALID SHOULD NOT BE SET ASIDE IS NOT IN ACCORD WITH THE AUTHORITIES INCLUDING AUTHORITIES OF THIS COURT.

It is evident from the findings of fact and the conclusions of law of the District Court in the record that the ultimate finding of validity by the District Court is an “ultimate finding”, inference or conclusion drawn by the trial Court from the actual fact findings. We maintain, and we are convinced that the record bears us out, that the inference or conclusion of valid-

ity drawn by the trial Court from the fact findings, as heretofore set forth in this brief on each of the points raised by appellee Lane-Wells, is clearly erroneous. It is, therefore, such a "finding of fact" that this Court is at liberty to set aside as erroneous under the rule of *Kuhn v. Princess*, 119 Fed. (2d) 704, which states the rule as follows:

"The appellee reminds us that we are not at liberty to disturb findings of fact made by the trial court unless they are unsupported by evidence or are otherwise clearly erroneous. Rule 52(a), 28 U.S.C.A. following section 723c.

* * * * *

"The rule does not operate, however, to trench with like finality the inferences or conclusions drawn by the trial court from its fact findings. And so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce. * * * Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action. Cf. *United States v. South Georgia Railway Co.*, 5 Cir., 107 F. (2d) 3, and *United States v. Mitchell*, 8 Cir., 104 F. (2d) 343, 346. An incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52(a) specifically provides."

This Court approved the rule of that case in the case of *Home Indemnity Co. of New York v. Standard Acc. Ins. Co. of Detroit*, 167 Fed. (2d) 919. See also *Murray v. Novlesville Milling Co.*, 131 Fed. (2d) 470.

It is our contention here, and we believe it to be completely and fully supported by the evidentiary find-

ings of fact, that the ultimate findings and conclusions of “invention” and “validity” (which are the sole ones which can be relied upon by appellee Lane-Wells in this sort of an argument) are in direct conflict, and that such ultimate findings and conclusions of “invention” and “validity” referred to are incorrect conclusions by the trial Court. Therefore, such “findings” qualify as clearly erroneous findings for the correction whereof on appeal Rule 52(a) specifically provides. As an authority for this last proposition, we refer again to the cases above cited.

We say that the cases of *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 9 Cir., 151 Fed. (2d) 91; *Refrigeration Engineering, Inc. v. York Corporation*, 168 Fed. (2d) 896, as well as the case of *Bianchi v. Barili*, 168 Fed. (2d) 793, are not in point because those cases deal with the evidentiary findings of fact as well as the findings inferred therefrom. That is not the case here because a correct application of the law to the evidentiary findings of fact would properly result only in ultimate “findings” or “conclusions” that the patent in suit is totally invalid on any and all of the following grounds:

(a) The claims of the patent define (when measured by the accused apparatus) an unpatentable aggregation and not a patentable combination.

(b) The claims of the patent in suit do not define the invention with the particularity required by R.S. 4888.

(c) The apparatus of the patent will not accomplish its intended result without addition thereto of other devices, apparatus or equipment not described or referred to in the patent, and invalidity is shown

by the lack of sufficient description as well as inoperability and lack of utility.

(d) The claims of the patent are for an abstract idea, and an abstract idea is unpatentable.

(e) The claims are invalid as not defining an invention, when measured by the accused apparatus, because it required only mechanical skill to produce the accused apparatus.

(f) In that the device shown in the patent in suit is not of any practical benefit in industry when constructed and operated in accordance with the specification and drawings of the patent.

CONCLUSION.

We respectfully urge that the Court may find the patent in suit and the claims thereof totally invalid on any and all of the grounds set forth under the preceding chapter of this brief, and we respectfully pray that the judgment of the District Court to the extent that it holds the patent in suit and the claims thereof to be valid be reversed.

Dated, San Francisco, California,
April 15, 1949.

Respectfully submitted,

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No. 11965.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LANE-WELLS COMPANY, a corporation,

Appellant,

vs.

M. O. JOHNSTON OIL FIELD SERVICE CORPORATION,
a corporation,

Appellee.

M. O. JOHNSTON OIL FIELD SERVICE CORPORATION,
a corporation,

Cross-Appellant,

vs.

LANE-WELLS COMPANY, a corporation,

Cross-Appellee.

REPLY BRIEF OF DEFENDANT-APPELLANT
(LANE-WELLS COMPANY).

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APR 20 1949

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No. 11965.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LANE-WELLS COMPANY, a corporation,

Appellant,

vs.

M. O. JOHNSTON OIL FIELD SERVICE CORPORATION,
a corporation,

Appellee.

M. O. JOHNSTON OIL FIELD SERVICE CORPORATION,
a corporation,

Cross-Appellant,

vs.

LANE-WELLS COMPANY, a corporation,

Cross-Appellee.

REPLY BRIEF OF DEFENDANT-APPELLANT (LANE-WELLS COMPANY).

Introduction.

This brief is the reply of Defendant-Appellant, Lane-Wells Company,* to the Answering Brief for Plaintiff-Appellee, M. O. Johnston Oil Field Service Corporation.*

*Defendant-Appellant, Lane-Wells Company, is hereinafter called "Defendant"; and Plaintiff-Appellee, M. O. Johnston Oil Field Service Corporation, is hereinafter called "Plaintiff." All italics are ours.

This brief points out our convictions :

(a) That the contentions of Plaintiff, presented in an attempt to answer the evidence, law, and argument set forth in our Opening Brief for Defendant do not answer such evidence, argument, or the law cited in support thereof;

(b) That, if there are any findings or conclusions of the District Court apparently inconsistent with the findings and conclusions made by the District Court in favor of the Defendant urged in its opening brief and the evidence and the law in support thereof, those cited in such opening brief should prevail; and

(c) That such contentions of Plaintiff as are presented in its answering brief are not applicable to the situation here presented.

ARGUMENT.

A. PLAINTIFF'S ARGUMENT (PAGE 6 OF ITS ANSWERING BRIEF) That a Court May, if Necessary to Maintain the Validity of the Patent, Narrowly Construe the Claims and Thus Find Non-Infringement, IS WHOLLY INAPPLICABLE HERE.

Plaintiff, beginning at page 6 of its answering brief, labors at length this contention. That it is inapplicable is shown by the gist of the single citation from Walker and the bald statement of Plaintiff's contention which follow.

The gist of the quotation is:

“for narrow construction may be as necessary to establish the validity of a patent as a broad construction is to lay the foundation for proof of infringement” (p. 7, Answering Brief for Plaintiff-Appellee).

No “narrow construction” was “necessary to establish the validity” of this Lane patent, for three reasons:

- (1) No Prior Patent Disclosed a Combined Gun Perforator, Formation Tester, and Packer, and None Was Known Prior to the Lane Patent.¹

¹“Q. Never before the applications for the patents in suit, the Lane and Spencer patents, did you ever see, hear of, or know of any use, invention by others, or any disclosure in a printed publication or a patent of a combined gun perforator, packer and formation tester in a unitary tool that could be run into and withdrawn from a well as a unit; that is true, isn't it? A. As a unit; only separately.

Q. With that qualification, you agree that that is true? A. That is true up to the time of that patent.

Q. Of the patents in suit? A. Of the patents in suit.” [M. O. Johnston Tr. 424-25.]

(2) Plaintiff's Expert With Full Knowledge of the Lane Patent Attempted to Provide the Lane Patented Combination From Old Patents by Alterations Suggested by None of Them and Provided an Impractical Tool.

Plaintiff's expert, O'Neill, attempted to combine a gun perforator from an old patent [Pltf. Ex. 17-G] with an old formation tester from an old patent [Pltf. Ex. 17-S] and ended with the result shown in Plaintiff's Exhibit 22, testifying that this attempt required him to:

(a) Drill through the cap at the bottom of the anchor of the tester of Plaintiff's Exhibit 17-S;

(b) Drill a hole upwardly through the center of the stem of the tester of Plaintiff's Exhibit 17-S;

(c) Place a packing at each end of the hole drilled through the stem of the tester of Plaintiff's Exhibit 17-S;

(d) Pass an electrical cable out through the side of the collar at the top of the tester of Plaintiff's Exhibit 17-S; and

(e) Use, instead of a conical packer which he used in Plaintiff's Exhibit 22, a different style of packer. [Tr. 315-317.]

Neither of the old patents Plaintiff's Exhibit 17-G [Tr. 584] or Plaintiff's Exhibit 17-S [Tr. 617] disclosed or suggested any of these numerous changes.

Yet with all of the hindsight provided by knowledge of the Lane Patent to Plaintiff's expert, O'Neill, in making these numerous alterations [Pltf. Exs. 30-B-1 to 5], he did not provide a tool which was practical, as established by the testimony of Plaintiff's president, who admitted that to thread an electrical conductor through the drill pipe or tubing "would not be practical to do." [Tr. 180, 196, 197; Cross-Appellee's Answering Brief, footnotes 11 and 12.]

(3) No Prior Patent Relied Upon by Plaintiff to Invalidate the Lane Patent Is Any Closer or More Pertinent to the Lane Patent Than Those Prior Patents Considered and Rejected by the Patent Office in Allowing the Lane Patent in Suit and Its Parent.

Attached as Exhibit A to Cross-Appellee's Answering Brief is a chart of the prior art which was cited and considered by the Patent Office in the prosecution of the application for the parent of the Lane patent in suit, *i. e.*, No. 2,029,490, and the application for the patent in suit. Also included upon the chart are all of the prior patents relied upon by the Plaintiff to invalidate the claims of the Lane patent in issue.

This chart Exhibit A is a part of the chart Defendant's Exhibit L in evidence [Tr. 474], and graphically and dramatically demonstrates that there are disclosed in the prior patents cited by the Plaintiff as invalidating the Lane patent no patents which disclose the combination of a gun perforator, packer, and formation tester and no patents which disclose more nearly than the file wrapper references considered and rejected by the Patent Office the combination defined by the claims of the Lane patent in issue.

It is apparent that for the foregoing three reasons no "narrow construction" was "necessary to establish the validity" of the Lane patent, and that Plaintiff's argument and single authority cited in the section beginning at page 6 to contrary effect is wholly irrelevant.

Likewise irrelevant is the bald statement of the Plaintiff in the same section of its brief:

"Undoubtedly, the District Court *attempted to sustain the validity of the patent and could do so only by narrowing the claims* to the precise apparatus disclosed in the specification thereof . . ."

For the three reasons and the evidence establishing them, hereinbefore recited, it is clear that no limitation of the claims of the Lane patent was necessary to sustain their validity.

This section of the Answering Brief for Plaintiff-Appellee, commencing at page 6, is therefore a make-weight and deserving of no consideration.

B. PLAINTIFF'S ARGUMENT (PAGE 6 OF ITS ANSWERING BRIEF TO THE END THERE-OF) That the Claims of the Lane Patent Are Not Infringed, Because the Accused Device Does Not Contain Substantially the Same Elements, Operating in Substantially the Same Way, to Accomplish Substantially the Same Result, IS WHOLLY INAPPLICABLE HERE.

Plaintiff has cited excerpts from a very few decisions of this Circuit to support its contention. If the contention be accepted, it is not applicable here, because the accused device has substantially the same elements, operating in substantially the same way, to accomplish substantially the same result.

(1) The Accused Device Has Substantially the Same Elements as the Claims of the Lane Patent in Issue.

(a) The presence of the elements defined by the Lane patent claims in issue in the accused device is admitted by the Plaintiff in its Complaint.²

²"Paragraph VII of the Complaint recites:

"That in the event that claims numbered 7, 8, 9, 11, 12, 13 and 14 of Letters Patent No. 2,029,491 . . . are valid and interpreted and applied literally as worded, that the same can be read upon the Johnston Perforator and Formation Tester manufactured, operated and used by this plaintiff and would be infringed thereby.' [Tr. 5.]" (Opening Brief for Defendant-Appellant, p. 10.)

(b) The presence of the elements defined by the Lane patent claims in issue in the accused device was admitted by Plaintiff's counsel at the trial.³

(c) The presence of the elements of the Lane patent claims in issue was tacitly admitted by the decision of the District Court.

This follows from the fact that it was found necessary by the District Court to limit the clear language obviously understood by the Plaintiff and Plaintiff's counsel and Plaintiff's expert to less than its ordinary import and to the *precise* devices illustrated in the drawing of the Lane patent in order to avoid a holding of infringement.

(d) The presence of the elements of the claims of the Lane patent in issue in the accused device is established by the evidence.

Set forth hereinafter are two columns, the one on the left representing the elements of Claim 11 of the Lane patent in issue, and the one on the right representing excerpts from Defendant's Exhibit AI-1, having reference to Defendant's Exhibits AI-2 and AI-3 [originally mis-numbered and erroneously referred to in the Findings of Fact and Conclusions of Law as Defendant's Exhibits AH-1, AH-2, and AH-3, respectively].

³"The Court: If they are as broad as claimed and are valid in that breadth, to that extent, you freely concede there has been infringement.

Mr. Mellin: I think the court just put, in other words, exactly what I pleaded.

Mr. Foster: That applies to both patents, Mr. Mellin?

Mr. Mellin: Of course." [Tr. 98.]

Column 1.

Column 2.

Claim 11 of Lane patent
No. 2,029,491:

The accused device described and illustrated in Defendant's Exhibits AI-1, AI-2, and AI-3:

A formation tester comprising: [Pltf. Ex. 1, Tr. 483, col. 1, line 36]

"In general, the formation tester, . . ." [Deft. Ex. AI-1, p. 1, lines 2-3]

a gun unit adapted to be lowered into a well bore [Pltf. Ex. 1, Tr. 483, col. 1, lines 36-37]

"Zone VII designates the gun perforator" [Deft. Ex. AI-1, p. 2, lines 11-12]

arrange to fire a projectile through a well casing into a surrounding formation; [Pltf. Ex. 1, Tr. 483, col. 1, line 37, to col. 2, lines 1-2]

"The bullets 108 thus perforate the well casing in the manner shown at 170 in Fig. 2b by way of illustration" [Deft. Ex. AI-1, p. 17, lines 18-19]

a sample receiving means having an inlet in proximity to said unit; [Pltf. Ex. 1, Tr. 483, col. 2, lines 2-3]

"The casing fluid and production fluid being sampled may then flow past the ball valve 8, through the ducts 44, the passages 48 and 49, and thence upwardly through the top coupling or sub 1 into the tubing string" [Deft. Ex. AI-1, p. 19, lines 20-23]

Column 1.

Column 2.

and packer means for minimizing the introduction of fluids into said sample receiving means from sources other than the avenue provided by said projectile [Pltf. Ex. 1, Tr. 483, col. 2, lines 3-7]

“A casing packer operable to provide a seal between the formation tester and the well casing, thereby preventing fluid in the annulus between the tubing string and casing and above the packer from entering the tubing string” [Def’t. Ex. AI-1, p. 2, lines 25-28]

For the four reasons hereinbefore set forth it is submitted that the accused device has substantially the same elements as the claims of the Lane patent in issue.

(2) The Accused Device Has Substantially the Same Mode of Operation as the Operation Defined in the Claims of the Lane Patent in Issue.

This is established by an amended finding of fact specially made after the original Findings of Fact and Conclusions of Law were made by the District Court:

“(1) The Findings of Fact and Conclusions of Law heretofore made are amended as follows:

“(a) After Finding of Fact No. 19 add:

“—The following steps in the performance and use of the tool of the Lane patent in suit, No. 2,029,491, is described in such Lane patent, are identical with the steps in the performance and use of the Johnston accused tool as exemplified by Defendant’s Exhibits AH-1, AH-2, and AH-3:

“1. The elements are assembled into a combined tool including a gun perforator, packer, and tester.

“2. The combined tool is lowered in the well to the point where it is desired to perforate.

“3. The gun is fired to perforate the casing.

“4. Several guns are fired successively.

“5. The drill pipe is rotated one turn to the left to unlatch the packer and set the slips.

“6. The weight of the drill pipe is lowered on the slips to set the packer.

“7. The drill pipe or tubing is open to the formation below the set packer.

“8. The entrance valve into the tool is left open until a sufficient quantity of the test liquids is secured in the tool.” [Tr. 78.]

This finding was fully established by the testimony of Plaintiff's expert O'Neill, and there is no contrary evidence in the record. Mr. O'Neill's testimony appears at Tr. 266, 320, 321, 267, 321, 263, 325, 227, 228, and 326.

Hence there is fully established by the finding of the Court and the evidence that the accused device has substantially the same mode of operation as the operation defined in the claims of the Lane patent in issue.

(3) The Accused Device Was Designed to Accomplish and Does Accomplish Substantially the Same Result as That Defined by the Claims of the Patent in Suit.

This appears from the admissions of Plaintiff's president, M. O. Johnston:

“Q. One of the objects of the Lane patent is stated to be: to provide a formation tester which fires a projectile or several projectiles through the well casing and thereafter receives the sample through the perforation so made. [Lane patent, Plaintiff's

Exhibit 1, Tr. 481, column 1, lines 11-15.] That was one of your objects in providing the combined tool, the subject of this law suit? A. Yes, sir.

Q. And that object was accomplished by the combined tool? A. Yes sir.

Q. Another provision of the Lane patent is stated to be: to provide a gun-type formation tester which may be run in on standard tubing or the like and utilizes other conventional well equipment for its operation. [Lane patent, Plaintiff's Exhibit 1, Tr. 481, column 1, lines 28-31.] That was one of your objects in providing the combined tool of your company? A. That was the object of providing the gun.

Q. And that object was accomplished by the combined tool? A. Yes, sir.

Q. Another object of the Lane patent was: to provide a formation tester of this class in which the damage to the well casing consists merely in one or more relatively small round perforations that may be readily cemented up if improperly located or otherwise undesirable, thereby providing a formation tester which does not interfere with subsequent drilling or other operations in the well bore. [Lane patent, Plaintiff's Exhibit 1, Tr. 481, column 1, lines 32-39.] That also was a purpose of your provision, the plaintiff's provision of this combined tool? A. Yes, sir.

Q. And that purpose was accomplished by them? A. Yes, sir." [Tr. 398.]

It is clear from the record, therefore, that the accused device was designed to accomplish and does accomplish substantially the same result as that defined by the claims of the patent in suit.

It is clear, therefore, that Plaintiff's argument that the Court may, *if necessary to maintain the validity of the patent*, narrowly construe the claims is wholly inapplicable to the situation here; and that Plaintiff's argument that the claims of the Lane patent in issue are not infringed is not applicable also because the accused device contains substantially the same elements, operating in substantially the same way, to accomplish substantially the same result as the elements defined by the claims of the Lane patent in issue.

The record and Findings of Fact and Conclusions of Law, therefore, require, we respectfully submit, that the judgment of the lower Court should be reversed as to Paragraph 7 [Tr. 75], Paragraph 9, in so far as it relates to the Lane patent No. 2,029,491 [Tr. 76], and Paragraph 10 [Tr. 77]; that Findings of Fact and Conclusions of Law inconsistent with the striking and modifying of said judgment be likewise stricken or reversed; and that claims 7 to 9, inclusive, and 11 to 14, inclusive, of the Lane patent No. 2,029,491 be held valid and infringed by the manufacture and use of devices exemplified by Defendant's Exhibits AH-1, AH-2, and AH-3 (corrected as AI-1, AI-2, and AI-3).

Dated: At Los Angeles, California, this 15th day of April, 1949.

Respectfully submitted,

HARRIS, KIECH, FOSTER & HARRIS,
WARD D. FOSTER,
Attorneys for Defendant-Appellant.

No. 11966

United States

Circuit Court of Appeals

for the Ninth Circuit

J. J. NEWBERRY COMPANY, a corporation,
Appellant,

vs.

MERTON L. CRANDALL and ETTA
CRANDALL, his wife,
Appellees.

Transcript of Record

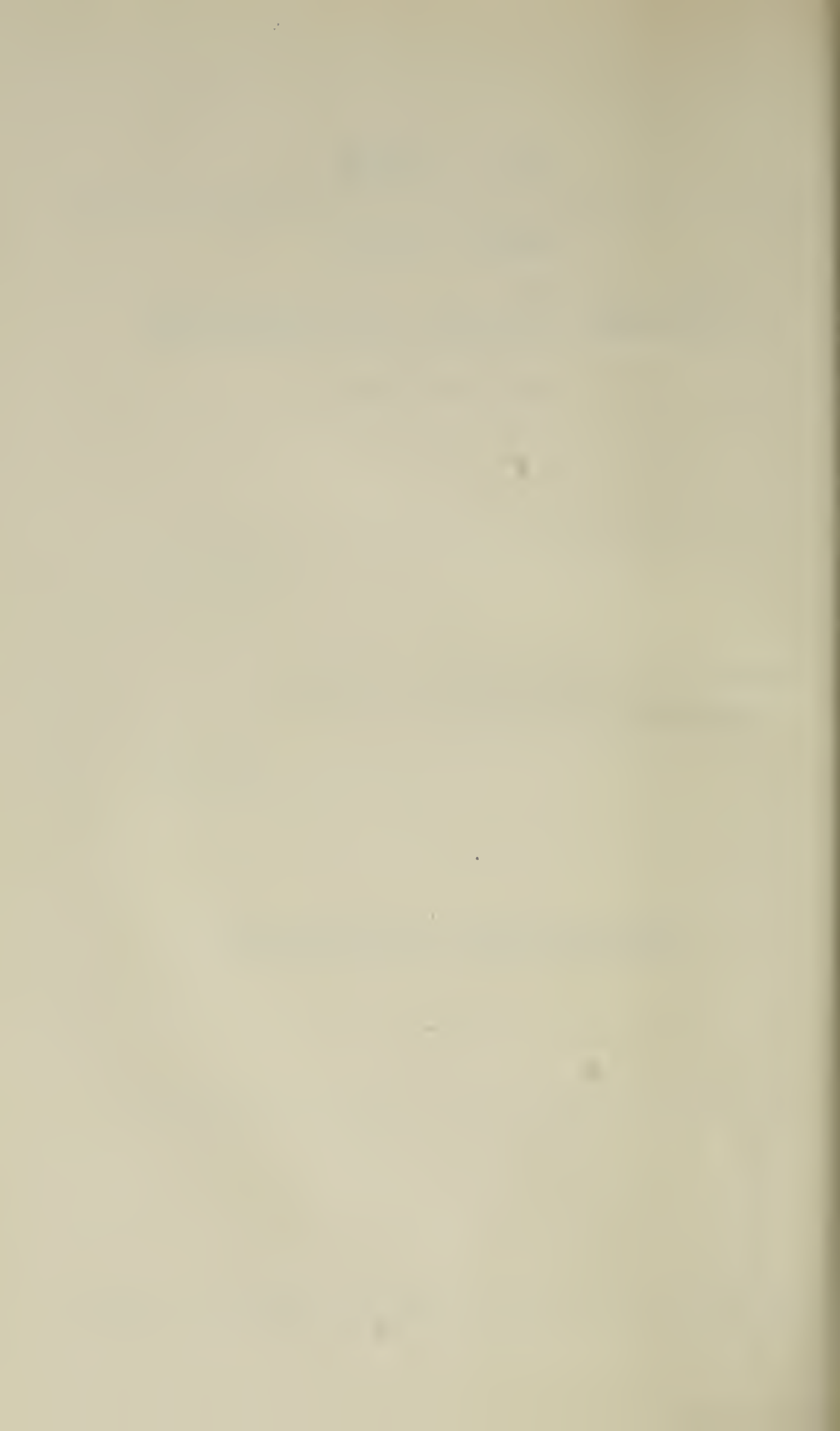
Upon Appeal from the District Court of the United States for
the District of Arizona

Typo Press, 398 Pacific, San Francisco

FILED

AUG 3 - 1948

PAUL P. O'BRIEN,



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Superior Court of the State of Arizona in
and for the County of Maricopa

Civ—1043 Phoenix

No. 57906—Div. 1

MERTON L. CRANDALL and ETTA

CRANDALL, his wife,

Plaintiffs,

vs.

J. J. NEWBERRY COMPANY, a corporation,
Defendant.

PETITION FOR REMOVAL TO FEDERAL COURT

The petition of J. J. Newberry Company, defendant in the above entitled cause, respectfully represents to this Honorable Court:

I.

That the above entitled action has been brought in this Court and the time within which the defendant is required to answer or otherwise plead has not yet expired.

II.

That said action is a suit of a civil nature.

III.

That the value of the matter in controversy in said action is in excess of Three Thousand (\$3,000.00) Dollars, as appears from the allegations of plaintiffs' complaint on file herein.

IV.

Your petitioner shows to the court that the action aforesaid involved a controversy which is wholly between citizens of different states in that Merton L. Crandall and Etta Crandall, his wife, the plaintiffs in said action were, at the time of the commencement of said action in this court and still are citizens and residents of the State of Michigan and that your petitioner, J. J. Newberry Company, defendant, was at the time of the commencement of said action and still is a corporation chartered by and existing under and by virtue of the laws of the State of Delaware and having its place and principal place of business in the City of Wilmington, State of Delaware.

V.

Your petitioner presents herewith a good and sufficient bond as provided as the statutes in such cases, that it will enter in the District Court of the United States, for the District of Arizona, within thirty (30) days from the date of the filing of this petition, a certified copy of the record in this suit, and that it will pay all costs which may be awarded by the said District Court in case the said Court shall hold that this suit was wrongfully [1*] or improperly removed thereto.

Wherefore, your petitioner prays that this Court proceed no further herein, except to make an order accepting the bond presented herewith and directing

*Page numbering appearing at foot of page of original certified Transcript of Record.

that a transcript of the record herein be made for filing in the United States District Court aforesaid.

GUST, ROSENFELD, DIVELBESS,
ROBINETTE & LINTON,

By WALTER LINTON,

Attorneys for Defendant.

(Duly Verified.)

[Endorsed]: Filed May 3, 1947. [2]

[Title of Superior Court and Cause]

ORDER REMOVING CAUSE TO THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA.

On this, the 3rd day of May, 1946, this cause came on for hearing, and J. J. Newberry Company, the defendant named in the above entitled action having filed and presented its petition and bond for removal of this cause to the United States District Court, for the District of Arizona, and the Court finding the same to be in due form, and the surety to be good and sufficient, and said bond being hereby approved, hereby ORDERS that this cause be removed to the United States District Court, for the District of Arizona, and that no further proceedings be had in this court, unless and until the Federal Court shall remand the same.

M. T. PHELPS,
Judge.

[Endorsed]: Filed May 3, 1947. [3]

[Title of Superior Court and Cause.]

COMPLAINT

The Plaintiffs complain and allege as follows:

I.

That the plaintiffs are husband and wife; that the defendant is a corporation duly organized and existing under the laws of the State of Delaware, and authorized to do business in the State of Arizona; that at all times hereinafter mentioned, the defendant corporation was and is doing business in the City of Phoenix, County of Maricopa, State of Arizona.

II.

That on or about the 11th day of February, 1946, the defendant corporation had the possession and control of a certain retail store wherein it conducted its business at the northeast corner of the intersection of First Avenue and Washington Street in the City of Phoenix, County of Maricopa, State of Arizona; that at said time and place the defendant corporation has possession and control of a certain doorway into said retail store from the First Avenue side of said store; that at said time and place, said doorway was used by the customers of the defendant corporation for the purpose of entering and leaving the premises wherein the defendant corporation conducted its retail business; that said doorway on said First Avenue side was above the grade or level of the sidewalk on First Avenue adjacent to said building; [4] that in

order to enter or leave defendant's retail store through said doorway on said First Avenue, it was necessary to use a certain step connecting said doorway and said sidewalk aforesaid; that defendant's retail store at said time and place also had certain doorways on the Washington Street side of said store; that at said time and place and on the Washington Street side of the defendant's retail store, said doorways were on the same level or grade as the sidewalk adjoining the store.

III.

That on the said day aforesaid, the plaintiff Etta Crandall, for the purpose of purchasing certain tissues in the defendant's store aforesaid, entered said store from the Washington Street side, inquired for said tissues, and being advised that the defendant was temporarily sold out of said tissues, proceeded to leave the defendant store through the doorway on the First Avenue side; that although the plaintiff, Etta Crandall, had entered said store through the Washington Street doorway, which was on the same level as the sidewalk adjoining said building, the plaintiff Etta Crandall received no notice or warning from the defendant that the doorway on the First Avenue side was not on the same level as the sidewalk adjacent thereto, and the plaintiff Etta Crandall received no notice from the defendant that a person leaving said doorway had to step down from the doorway on the First Avenue side to the sidewalk adjacent thereto; that the defendant was negligent in not giving such notice

or warning to the plaintiff in that, as aforesaid, the main doorway of the defendant on the Washington Street side is on the same level as the sidewalk, and further, in that the visibility of a person leaving the store on the First Avenue side is impaired in stepping from the dimly lit interior of the store into the brilliant sunshine of the exterior; that at said time and place, the plaintiff being unaware of said step, because she had entered the store [5] without the use of any steps on the Washington Street side of said store, and the plaintiff Etta Crandall's vision being impaired by the brilliant sunshine at said time and place, did not see said step; that the defendant was negligent also in that said step was not in a safe condition, in that said step had ridges and uneven places in said step; that said step at said time and place was so uneven so as not to afford the plaintiff a sure footing; that as a result of the condition of said step, as aforesaid, the plaintiff Etta Crandall tripped and fell to the ground.

IV.

That the unsafe condition of the said doorway and step, as aforesaid, was in existence for a long time prior to the time aforesaid, and was known, or should have been known, by the defendant, ~~*in that many customers of the defendant had been injured prior to the time aforesaid as a result of the unsafe condition of said step and doorway, as aforesaid.~~ [*Stricken; order of 6/25/48.]

V.

That the plaintiff Etta Crandall's fall was caused

by the negligence of the defendant as aforesaid; that as a result thereof, the plaintiff Etta Crandall was rendered sick and lame, suffered many bruises and contusions in and about her body, and suffered a fractured hip, and was confined to a hospital and to bed; that said injuries as aforesaid have permanently disabled the plaintiff Etta Crandall to her damage in the sum of Ten Thousand Dollars (\$10,000.00).

VI.

That the plaintiff Etta Crandall at said time and place had been in attendance upon her husband, the plaintiff Merton L. Crandall, in nursing him back to health from pneumonia; that as a result of her injuries as aforesaid, the plaintiff Etta Crandall could no longer take care of her husband, the said Merton L. Crandall; [6] that the plaintiff Merton L. Crandall also expended hospital, medical and nursing expenses for the said plaintiff Etta Crandall in connection with the injuries aforesaid, all of the same resulting to the damage of the plaintiff Merton L. Crandall in the sum of Five Thousand Dollars (\$5,000.00).

Wherefore, the plaintiff Etta Crandall prays judgment against the defendant in the sum of Ten Thousand Dollars, and for her costs herein expended; the plaintiff Merton L. Crandall prays judgment against the defendant in the sum of Five Thousand Dollars, and for his costs herein expended; and the plaintiffs pray for such other and

further relief as may be meet, just and proper in the premises.

MAURICE D. BROWN,
Attorney for Plaintiffs.

[Endorsed]: Filed April 12, 1947.

[Endorsed]: (Record on Removal) Filed June 2, 1947. [7]

In the United States District Court for the
District of Arizona

MINUTE ENTRY OF FRIDAY, JUNE 27, 1947
(Phoenix Division)

April 1947 Term. At Phoenix.

Honorable Dave W. Ling, United States District
Judge, presiding.

CIV-1043

MERTON L. CRANDALL, et ux,
Plaintiff,

vs.

J. J. NEWBERRY COMPANY,
Defendant.

It Is Ordered that the Defendant's Motion to
Strike herein be and it is granted. [10]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, J. J. Newberry Company, a corporation, and for its answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I and II of plaintiff's complaint.

II.

This defendant admits that the plaintiff Etta Crandall was in the defendant's store on or about the 11th day of February, 1946, and that the plaintiff attempted to leave the defendant's store from the First Avenue entrance, and admits that the doorway on the First Avenue entrance is not at the same level as the sidewalk adjacent thereto. This defendant denies each and every, all and singular, the remaining allegations of paragraph III of plaintiff's complaint.

III.

This defendant denies that the condition of said doorway and step was unsafe and denies each and every, all and singular the remaining allegations of paragraph IV of plaintiff's complaint. [11]

IV.

This defendant denies the allegations of paragraphs V and VI of plaintiff's complaint.

V.

This defendant, for further answer to plaintiff's complaint, alleges that if the plaintiff, Etta Crandall was injured or damaged, such injuries or damages were caused or contributed to by her own negligence.

Wherefore, having fully answered plaintiff's complaint, this defendant prays that said complaint be dismissed and for its costs herein incurred.

GUST, ROSENFELD, DIVELBESS,
ROBINETTE & LINTON,
By WALTER LINTON,
Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed July 2, 1947. [12]

In the United States District Court for the
District of Arizona

MINUTE ENTRY OF TUESDAY, APR. 6, 1948
(Phoenix Division)

April 1948 Term. At Phoenix.

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

This case comes on regularly for trial this date. The plaintiffs are present with counsel, Maurice Brown, Esquire, and Samuel Langerman, Esquire.

Walter Linton, Esquire, and Harold Divelbess, Esquire, are present for the defendant. Louis L. Billar is present as official reporter.

Both sides announce ready for trial.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case.

Thereupon, It Is Ordered that all jurors not empaneled in the trial of this case be excused until further order.

Counsel for the Plaintiffs now reads the Complaint to the Jury and thereafter, counsel for the defendant reads the Answer to the Jury.

PLAINTIFFS' CASE:

The following plaintiffs' witnesses are now sworn and examined: Marie Cooley, Donna Mae Cooley, Charles C. Huffman.

Etta Crandall is now sworn and examined in her own behalf.

Merton L. Crandall is now sworn and examined in his own behalf.

The following plaintiffs' exhibits are now admitted in evidence: 1. Hospital bill; 2. Hospital bill; 3. Receipt; 4. Receipt; 5. 8 Cancelled checks; 6A. Cancelled check.

And thereupon, at the hour of twelve o'clock noon, It Is Ordered that the further trial of this case be continued until two o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of two o'clock p.m., the jury and all members thereof, the parties and their respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

PLAINTIFFS' CASE CONTINUED:

Merton L. Crandall is now recalled and further examined in his own behalf.

Etta Crandall is now recalled and further examined in her own behalf.

Mathew Cohen is now sworn and examined on behalf of the defendants.

Whereupon, the plaintiffs rest.

And thereupon, at the hour of 2:50 o'clock p.m., the Jury is admonished and excluded from the court room.

Counsel for the defendant now moves for a directed verdict and It Is Ordered that said motion be and the same is denied.

DEFENDANT'S CASE:

Charles C. Huffman, heretofore sworn, is now called and examined on behalf of the defendants.

Joe Scott is now sworn and examined on behalf of the defendants.

The following defendant's exhibits are now admitted in evidence: A. Diagram; B. Diagram.

And thereupon, at the hour of 3:40 o'clock p.m., pursuant to stipulation of counsel, It Is Ordered that the bailiff conduct the jury to view premises

herein accompanied by counsel, and that said jury be excused thereafter until ten o'clock a.m., Wednesday, April 7, 1948,

Said jury is now duly admonished by the Court and now retire in charge of their bailiff.

It Is Ordered that the further trial of this case be continued until ten o'clock a.m., Wednesday, April 7, 1948, to which time the parties and counsel are excused. [17]

In the District Court of the United States for the
District of Arizona

MINUTE ENTRY OF WEDNESDAY,
APRIL 7, 1948—(Phoenix Division)

April 1948 Term. At Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Cause.]

The Jury, and all members thereof, the parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

DEFENDANT'S CASE CONTINUED:

Hugh John Miller is now sworn and examined on behalf of the defendant.

Defendant's Exhibit C, photograph, is now admitted in evidence.

Charles C. Huffman is now recalled and further examined on behalf of the defendant.

Thereupon, the defendant rests.

REBUTTAL:

Etta Crandall is now recalled and further examined in her own behalf.

Thereupon, at the hour of 10:15 o'clock a.m., the Jury being first duly admonished by the Court, It Is Ordered that this Court do stand at recess to 11:30 o'clock a.m.

Subsequently, at the hour of 11:30 o'clock a.m., the Jury and all members thereof, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

REBUTTAL CONTINUED:

Elvera Magnuson is now sworn and examined on behalf of the plaintiffs.

And the Plaintiffs rest.

Both sides rest.

All the evidence being in, the case is argued by counsel for the plaintiffs to the Jury.

And thereupon, at the hour of twelve o'clock noon, It Is Ordered that the further trial of this case be continued to the hour of two o'clock p.m., this date, [18] to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of two o'clock p.m.,

the Jury and all members thereof, the parties and their respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

The case is now further argued by respective counsel to the Jury. Whereupon, the Court duly instructs the Jury and said Jury retire at the hour of 3:10 o'clock p.m. in charge of a sworn bailiff to consider of their verdict.

Counsel for both sides now waive their presence at reception of verdict.

Subsequently, the Jury return in a body into open Court at the hour of 4:25 o'clock p.m., and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon the foreman reports that they have agreed and presents the following verdict, to-wit:

[Title of Cause.]

VERDICT

CIV-1043—Phoenix

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs, and assess their damages at \$12,500.00.

\$10,000.00 for Mrs. Etta Crandall

\$2,500.00 for Mr. Merton Crandall for expenses incurred in this damage suit plus Court costs *f*

THOMAS P. OWEN,
Foreman.

The verdict is read as recorded, and the Jury is

discharged from the further consideration of this case and excused to further order.

[Endorsed]: Filed April 7, 1948. [19]

In the District Court of the United States
for the District of Arizona

MINUTE ENTRY OF MONDAY, APR. 12, 1948
(Phoenix Division)

April 1948 Term. At Phoenix.

Honorable Dave W. Ling, United States District
Judge, presiding.

Civil No. 1043—Phoenix

MERTON L. CRANDALL and ETTA

CRANDALL, his wife,

Plaintiffs,

vs.

J. J. NEWBERRY COMPANY, a corporation,

Defendant.

JUDGMENT

This cause came on regularly for trial, the said parties appearing by their attorneys. A jury of twelve persons were regularly impaneled and sworn to try the action. Witnesses on the part of the plaintiffs and defendant were sworn and examined. After hearing the evidence, the argument of counsel and the instructions of the court, the jury retired to consider their verdict and subsequently returned into court, and through their Foreman, Thomas P. Owen, say they find a verdict

for the plaintiff Etta Crandall in the sum of Ten Thousand Dollars (\$10,000) and for the plaintiff Merton L. Crandall in the sum of Twenty-five Hundred Dollars (\$2,500), together with the said plaintiffs' costs and disbursements incurred in this action.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that the said plaintiff Etta Crandall do have and recover of the said defendant the sum of Ten Thousand Dollars (\$10,000) with interest thereon at the rate of Six Percent (6%) per annum from the date hereof until paid, and that the plaintiff Merton L. Crandall do have and recover of the said defendant the sum of Twenty-five Hundred Dollars (\$2,500) with interest thereon at the rate of Six Percent (6%) per annum from the date hereof until paid, together with the said plaintiffs' costs and disbursements incurred in this action, taxed in the sum of \$66.92.

Dated, this 12 day of April, 1948.

DAVE W. LING,
Judge.

Approved as to form.

WALTER LINTON,
Attorney for Defendant. [21]

(Clerk's note: Amended—\$745.95 of \$2,500 amt. remitted.—WHL.)

[Endorsed]: Filed April 12, 1948. [22]

In the District Court of the United States in and
for the District of Arizona

Civil No. 1043—Phoenix

MERTON L. CRANDALL and ETTA
CRANDALL, his wife,

Plaintiffs,

vs.

J. J. NEWBERRY COMPANY, a corporation,
Defendant.

JUDGMENT

This cause came on regularly for trial, the said parties appearing by their attorneys. A jury of twelve persons were regularly impaneled and sworn to try the action. Witnesses on the part of the plaintiffs and defendant were sworn and examined. After hearing the evidence, the argument of counsel and the instructions of the court, the jury retired to consider their verdict and subsequently returned into court, and through their Foreman, Thomas P. Owen, say they find a verdict for the plaintiff Etta Crandall in the sum of Ten Thousand Dollars (\$10,000) and for the plaintiff Merton L. Crandall in the sum of Twenty-five Hundred Dollars (\$2,500), together with the said plaintiffs' costs and disbursements incurred in this action.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that the said plaintiff Etta Crandall do

have and recover of the said defendant the sum of Ten Thousand Dollars (\$10,000) with interest thereon at the rate of Six Percent (6%) per annum from the date hereof until paid, and that the plaintiff Merton L. Crandall do have and recover of the said defendant the sum of Twenty-five Hundred Dollars (\$2,500) with interest thereon at the rate of Six Percent (6%) per annum from the date hereof until paid, together with the said plaintiffs' costs and disbursements incurred in this action, taxed in the sum of \$66.92. [23]

Dated, this 12th day of April, 1948.

DAVE W. LING,
Judge.

Approved as to form.

WALTER LINTON,
Attorney for Defendant.

[Endorsed]: Filed April 12, 1948. [24]

[Title of District Court and Cause.]

Civil Docket

PROCEEDINGS

Apr. 12-14—Enter and file Judgment for pltf. Etta Crandall in sum of \$10,000.00 and for Merton L. Crandall in sum of \$2,500 (Notation entered in Civil and Judgment Dockets 4/12/48).

May 5—Samuel Langerman for pltf. No appearance for deft. It appearing to the court that the jury herein in its verdict assessed damages

for pltf. Merton L. Crandall in sum of \$2,500, and that \$745.95 of said amount is excessive, Order said excessive amount of \$745.95 be remitted and judg. amended. (Notation entered in Civil Docket 5/5/48.) [25]

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND
JUDGMENT, OR, IN THE ALTERNATIVE
MOTION FOR NEW TRIAL

Comes now the defendant, J. J. Newberry Company, a corporation, and moves the court for an order setting aside the verdict and judgment in the above entitled cause, and granting the defendant's motion for directed verdict made at the close of all the evidence.

In the event said motion be not granted, the defendant moves the court for an order setting aside the judgment herein, and granting a new trial of the above entitled cause, for the following reasons:

1. The verdict and judgment is not justified by the evidence.
2. The verdict and judgment are not justified by the evidence and are contrary to law.
3. The verdict and damages awarded were so excessive that they indicate gross error and reckless disregard of the evidence, and the law, on the

part of the jury, and that the jury was actuated by passion or prejudice in arriving at its verdict. [26]

4. The court erred in refusing defendant's motion for directed verdict at the close of the entire case.

Dated this 19th day of April, 1948.

GUST, ROSENFELD, DIVELBESS,
ROBINETTE & LINTON,

By /s/ Walter Linton

Attorneys for Defendant.

Received copy of within this 19 day of April,
1948.

BROWN & LANGERMAN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Apr. 19, 1948. [27]

In the District Court of the United States
For the District of Arizona

MINUTE ENTRY OF MONDAY, MAY 3, 1948
(Phoenix Division)

April 1948 term, at Phoenix.

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause]

Defendant's Motion to Set Aside Verdict and
Judgment, or in the alternative Motion for New
Trial comes on regularly for hearing this day.
Samuel Langerman, Esquire, appears as counsel

for the plaintiffs, and Walter Linton, Esquire, appears as counsel for the defendant. Said motion is now duly argued by respective counsel. Said counsel for plaintiffs states that plaintiffs will remit any amount which counsel may stipulate is excessive; whereupon,

It is ordered that defendant's Motion to Set Aside Verdict and Judgment, or in the alternative Motion for New Trial be and it is denied. [28]

In the District Court of the United States
For the District of Arizona

MINUTE ENTRY OF WEDNESDAY, MAY
5, 1948

(Phoenix Division)

April 1948 term, at Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Cause]

Samuel Langerman, Esquire, appears as counsel for the plaintiffs. No appearance is made on behalf of the defendant.

It appearing to the Court that the Jury herein in its verdict assessed damages to the plaintiff Merton L. Crandall in the sum of \$2,500.00, and that \$745.95 of said amount is excessive,

It is ordered that said excessive amount of \$745.95 be remitted. [29]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that J. J. Newberry Company, a corporation, defendant, does hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from that certain judgment rendered in the above entitled court and cause on the 12th day of April, 1948, and from the order denying defendant's motion for new trial, made and entered on the 3rd day of May, 1948.

Dated the 28th day of May, 1948.

GUST, ROSENFELD, DIVELBESS,
ROBINETTE & LINTON,

By /s/ Harold L. Divelbess

Attorneys for J. J. Newberry
Company.

[Endorsed]: Filed May 28, 1948. [30]

[Title of District Court and Cause.]

BOND ON APPEAL AND SUPERSEDEAS BOND

Know All Men By These Presents:

That we, J. J. Newberry Company, a corporation, as principal, and Fidelity & Deposit Company of Maryland, a surety company duly authorized to write surety bonds in the State of Arizona, as surety, are held and firmly bound, jointly and severally, unto Merton L. Crandall and Etta Crandall, his wife, the plaintiffs in the above-entitled cause,

in the penal sum of Thirteen Thousand (\$13,000.00) Dollars, lawful money of the United States, to be paid to the above-named plaintiffs, their executors, administrators or assigns, for the payment of which sum well and truly to be paid, we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 28th day of May, 1948.

The condition of the above obligation is such that

Whereas, a judgment was rendered in the above entitled cause on the 12th day of April, 1948, against the defendant and in favor of the plaintiffs therein, and the defendant after the entry of said judgment duly filed its motion for a new trial in said cause, and an order was made and entered in the above entitled cause on the 3rd day of May, 1948, denying said [31] motion for a new trial; and

Whereas, said defendant has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the said judgment made and entered in said cause on the 12th day of April, 1948, and also from the order denying said motion for a new trial made and entered on the 3rd day of May, 1948; and

Whereas, the defendant and appellant desires to suspend the execution of the above-described judgment during the pendency of the appeal therefrom;

Now, therefore, if the said J. J. Newberry Company shall prosecute its said appeal with effect,

and if it shall satisfy the judgment of the United States Circuit Court of Appeals for the Ninth Circuit in full, together with costs and interest, if said judgment be against it, and shall pay all such damages and costs as may be awarded against it on said appeal; then this obligation shall be void, otherwise it shall remain in full force and effect.

In witness whereof, the undersigned have executed this appeal and supersedeas bond this 28th day of May, 1948.

J. J. NEWBERRY COMPANY,
Principal

By GUST, ROSENFELD, DIVELBESS,
ROBINETTE & LINTON,

By James C. Engdahl,
Its Attorneys.

FIDELITY & DEPOSIT COMPANY
OF MARYLAND,

By C. A. Drummond,
Attorney-in-fact.

The foregoing appeal and supersedeas bond is approved and directed to be filed this 28th day of May, 1948.

DAVE W. LING,
Judge. [32]

[Endorsed]: Filed May 28, 1948. [33]

ORDER FOR TRANSMITTAL OF CERTAIN
ORIGINAL EXHIBITS AND REPORTER'S
TRANSCRIPT TO CIRCUIT COURT OF
APPEALS

Counsel for the appellant having designated that all exhibits in this case, together with the reporter's transcript, be contained in the record on appeal herein and it appearing to the court that the originals thereof, in lieu of copies, should be transmitted to the Circuit Court of Appeals,

It is ordered that the Clerk of this Court be and he is authorized and directed to transmit the original Reporter's Transcript, the originals of plaintiffs' exhibits 1, 2, 3, 4, 5 and 6-A, and of defendant's exhibits A, B and C, to the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record on appeal in this case.

Dated at Phoenix, Arizona, this 30th day of June, 1948.

DAVE W. LING,
United States District Judge.

[Endorsed]: Filed June 30, 1948. [35]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE REC-
ORD AND PROCEEDINGS TO BE CON-
TAINED IN RECORD ON APPEAL

Comes now the above named defendant and appellant, and designates the following portions of

the record and proceedings to be contained in the record on appeal:

1. Complaint,
2. Answer,
3. Verdict of Jury,
4. Judgment,
5. Defendant's Motion For New Trial,
6. The Clerk's notation of Judgment in the civil docket,
7. Final Judgment, as entered by the Clerk in the Minute Book,
8. All Exhibits marked for identification, or received in evidence in the case,
9. The Reporter's Transcript,
10. All Minute Entries made by the Clerk in said cause,
11. Notice of Appeal,
12. Bond on Appeal and Supersedeas Bond,
13. This Designation.

Dated this 4th day of June, 1948.

GUST, ROSENFELD, DIVELBESS,
ROBINETTE & LINTON,

By Harold L. Divelbess.

Attorneys for Defendant and
Appellant. [36]

Received copy of within this 4th day of June,
1948.

BROWN & LANGERMAN,
Attorneys for Pltfs.

By R. Truxal.

[Endorsed]: Filed June 4, 1948. [37]

In the United States District Court for the District
of Arizona

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Arizona—ss:

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Merton L. Crandall and Etta Crandall, his wife, Plaintiffs, vs. J. J. Newberry Company, a corporation, Defendant, numbered Civ-1043 Phoenix, on the docket of said Court.

I further certify that the attached pages numbered 1 to 38, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Appellant's Designation filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record remaining on file in my office, with the exception of the Reporter's Transcript, Plaintiffs' exhibits 1, 2, 3, 4, 5 and 6A and Defendant's exhibits A, B and C. I further certify that the original of the Reporter's Transcript filed herein, and the originals of Plaintiff's exhibits 1, 2, 3, 4, 5 and 6A, and of Defendant's exhibits A, B and C,

are transmitted herewith and made a part of the record on appeal herein, pursuant to order of the Court.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$13.20 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 2nd day of July, 1948.

(Seal) /s/ WM. H. LOVELESS,
Clerk. [38]

In the District Court of the United States for the
District of Arizona

No. Civ. 1043—Phx.

MERTON L. CRANDALL and ETTA
CRANDALL, His Wife,

Plaintiffs,

vs.

J. J. NEWBERRY COMPANY, a Corporation,
Defendant.

REPORTER'S TRANSCRIPT

The above entitled and numbered cause came on duly and regularly to be heard in the above entitled court, before Hon. Dave W. Ling, Judge, presiding with a jury, commencing at the hour of ten o'clock, A.M., on the 6th day of April, 1948, at Phoenix, Arizona.

The plaintiffs were represented by Messrs. M. D. Brown and Samuel Langerman.

The defendant was represented by Mr. Walter Linton and Mr. Harold Divelbess, of Messrs. Gust, Rosenfeld, Divelbess, Robinette & Linton.

The following proceedings were had:

The Court: All right, you may call the calendar.

The Clerk: Civil 1043, Phoenix, Merton L. [1*] Crandall and Etta Crandall, his wife, plaintiffs, versus J. J. Newberry Company, a corporation, defendant, for trial.

The Court: Ready?

Mr. Brown: The plaintiffs are ready your Honor.

Mr. Linton: The defendant is ready, your Honor.

The Court: Call the names of 18 jurors. As your names are called, come forward, please.

(Whereupon 18 jurors were called, examined on their voir dire, after which 12 jurors were empaneled and sworn, and the pleadings were read to the jury by counsel for the respective parties.)

The Court: Do you want to make an opening statement?

Mr. Langerman: We waive the opening statement.

The Court: All right, call your first witness.

Mr. Langerman: Mrs. Marie Cooley. Your Honor, we are calling both Mrs. Marie Cooley and Mrs. Donna May Cooley just a little bit out of their ordinary turn, as they have a sick baby and they have to get back.

The Court: All right. [2]

*Page numbering appearing at foot of page of original certified Transcript of Record.

MARIE COOLEY

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

Mr. Langerman:

Q. Will you state your name, please?

A. Marie Cooley.

Q. Are you a resident of Phoenix, Arizona?

A. Yes, sir.

Q. What is your occupation, Mrs. Cooley?

A. I am a housewife.

Q. Are you acquainted with the plaintiff, Mrs. Etta Crandall?

A. No, sir; I am not.

Q. On or about the 11th day of February, 1946, did you have occasion to be walking near the Newberry Store in Phoenix, Arizona?

A. Yes, sir.

Q. Were you alone at that time?

A. No, I was with my sister-in-law, Mrs. Donna May Cooley.

Q. About what time?

A. Well, I don't have any idea what time it was.

Q. Was it in the morning or in the afternoon?

A. Well, I could not truthfully say, because I [3] don't remember.

Q. It was during daytime?

A. Yes, sir.

Q. As you walked, did you have occasion to walk by the Newberry store?

A. Yes, sir—in fact, we were going in to the door, I think. It was our intentions.

(Testimony of Marie Cooley.)

Q. As you walked toward the door of the Newberry Store, which door was this?

A. Well, this one on First Avenue.

Q. As you walked toward that door, Mrs. Cooley, did you see the plaintiff, Mrs. Etta Crandall?

A. Yes, sir; we did.

Q. Where was she?

A. She was in the doorway.

Q. And what was she doing at the time you saw her?

A. She was falling.

Q. Mrs. Cooley, is there a space between the doorway of the First Avenue entrance to the Newberry Store and the sidewalk?

A. Well, there is a space between the door and the step, yes.

Q. How large a space is there?

A. Oh, I'd say two feet.

Q. And when you saw Mrs. Crandall, she was[4] in the doorway?

A. Yes, sir.

Q. And you said she was falling?

A. Yes, sir.

Q. What direction was she facing; was she facing any part of the Newberry Store, or outside?

A. She was facing the outside.

Q. Then what happened, Mrs. Cooley?

A. Well, the way I remember it, she was coming through the door, she was falling, and when she got to the step it seemed to turn her foot some way and she fell backwards onto the step onto the sidewalk.

(Testimony of Marie Cooley.)

Q. Where did she land?

A. She landed about three to five feet out on the sidewalk.

Q. Now, let me be clear on one thing, Mrs. Cooley. Was Mrs. Crandall already falling when you first saw her?

A. She was falling, yes, sir.

Q. Was she in the doorway?

A. She was coming through the door, yes.

Q. And that is a couple of feet, you said, prior to the time she reached that step?

A. Yes, I think it is that far.

Q. Are you aware of the cause of her fall? [5]

A. No, sir.

Q. Well, what, if anything, did you do then, Mrs. Cooley?

A. Well, we tried to catch her before she fell, and when we got to her, we picked her up and helped take her into the store, sir, I mean, back into the store.

Q. Just what happened?

A. Someone gave a chair for her and we sat her down and we stood there for a few minutes until the manager or someone came down, I am not sure it was the manager, and then we left.

Q. Mrs. Cooley, you stated you didn't know the plaintiff, Mrs. Crandall. Had you ever seen her prior to that time?

A. I had never seen her before she fell, no, sir.

Q. And did she become aware of who you were?

A. Well, I think—I was told that an old friend

(Testimony of Marie Cooley.)

of ours that works for Newberry gave our name and address.

Q. Gave you her name?

A. No, gave someone, some lawyer, I don't know, our name and address.

Q. You did not know Mrs. Crandall?

A. No; I never saw her but twice before now.

Q. You have no interest at all in the outcome of this trial? A. No.

Q. Did you ever visit Mrs. Crandall at the hospital?

A. Yes, sir; I did one time, and she was very sick. I didn't talk to her.

Mr. Langerman: I have no further questions.

Mr. Linton: No questions, your Honor.

(The witness was excused).

Mr. Langerman: Call Mrs. Donna May Cooley.

DONNA MAY COOLEY

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

Mr. Langerman:

Q. Will you state your name, please?

A. Donna May Cooley.

Q. What is your residence?

A. 3300 South Sixteenth Street.

Q. And what is your occupation?

A. Housewife.

(Testimony of Donna May Cooley)

Q. Do you know the plaintiff, Mrs. Etta Crandall? [7]

A. Well, I had never seen her until the accident.

Q. Do you now know her? A. Yes.

Q. Where did you become acquainted with her?

A. Well, in the hospital.

Q. You visited her at the hospital?

A. Yes, I did.

Q. On the 11th of February, 1946, Mrs. Cooley, did you have occasion to be walking near the Newberry Store in Phoenix, Arizona? A. Yes.

Q. Did you have occasion at that time to be on the First Avenue side entrance to that store?

A. Yes.

Q. Do you remember approximately what time of the day that was?

A. Well, not exactly, but I think it was somewhere close to noon.

Q. And on that occasion did you see the plaintiff, Mrs. Etta Crandall? A. I did.

Q. Where was she when you saw her?

A. She was in the doorway.

Q. Coming through the doorway?

A. Yes. [8]

Q. What direction was she going when you saw her?

A. She was going out toward First Avenue.

Q. Exiting from the store? A. Yes.

Q. What, if anything, was she doing at the time you first saw her? A. She was falling.

(Testimony of Donna May Cooley)

Q. What happened then, Mrs. Cooley?

A. Well, when she got to the ledge she seemed to give way and just went completely down.

Q. Did her falling start prior to the time she got to the Ledge, Mrs. Cooley? A. Yes, it did.

Q. What happened after she fell?

A. Well, she, somehow, in the stumbling, she turned herself some way and she fell out on the street.

Q. By "street", you mean the sidewalk?

A. The sidewalk.

Q. And then what happened, Mrs. Cooley?

A. Well, we rushed to her, tried to get there before she went completely down, but we didn't, and we helped her up and helped her into the store.

Q. And then what happened?

A. Well, I got a chair from my girl friend [9] and we sat her down in it until someone from upstairs came down with the manager and took her up.

Q. Subsequent to that time you have seen Mrs. Crandall? A. Yes.

Q. At the hospital? A. Yes.

Q. Well, the acquaintance with Mrs. Crandall, then, is in connection with this accident, is that right? A. That is right.

Q. You have no interest at all in the outcome of this trial? A. No.

Q. What condition was Mrs. Crandall in when you visited her at the hospital?

A. She was a very sick lady.

(Testimony of Donna May Cooley)

Q. How many times did you visit her?

A. Well, I wouldn't know exactly, maybe half a dozen times.

Mr. Langerman: I have no further questions.

The Court: You may cross examine.

Mr. Linton: No questions, your Honor.

Mr. Langerman: Your Honor, may we have these witnesses excused?

Mr. Linton: Very well. [10]

The Court: Yes.

Mr. Langerman: Call Mr. Huffman. Your Honor, prior to the beginning of this examination I'd like to point out that Mr. Huffman, while not a party to this suit, he is the manager of the Newberry Store and we are requesting that we be permitted to examine him as a hostile witness.

The Court: I never heard of such a thing.

Mr. Linton: I certainly object.

The Court: I never heard of such a proceeding.

CHARLES C. HUFFMAN

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

The Court: Let's get this straightened out. Are you calling him as your witness?

Mr. Langerman: Yes, we are, your Honor.

The Court: All Right.

Direct Examination

Mr. Langerman:

Q. Will you state your name, please?

A. Charles C. Huffman.

(Testimony of Charles C. Huffman.)

Q. What is your occupation, Mr. Huffman?

A. Store manager. [11]

Q. Of what store?

A. The J. J. Newberry Company.

Q. Is that here in Phoenix, Arizona?

A. Yes, sir.

Q. How long have you been manager of the Phoenix Arizona Newberry store?

A. 14 years.

Q. Can you tell us, Mr. Huffman, how long—strike that. Are you familiar, Mr. Huffman, with the condition of the construction of the doorway on the First Avenue side entrance of your Newberry Store?

A. I am.

Q. Can you tell us, Mr. Huffman, whether or not the construction which now exists existed on February 11th, 1946?

A. It was the same construction.

Q. How long prior to that time had the same construction existed?

A. Since 1938.

Q. In other words, since '38 there has been no alterations or changes in the construction of that doorway in that entrance?

A. That is right.

Q. Now, by "doorway", Mr. Huffman, I mean to include not only the doorway itself, but everything [12] leading from the doorway to the sidewalk. Does the same answer apply?

A. Yes.

Q. Mr. Huffman, have you had any notice of—strike that. Mr. Huffman, have any persons fallen in that—

(Testimony of Charles C. Huffman.)

Mr. Linton: We object to that, your Honor, that has been ruled on.

The Court: All right.

Mr. Langerman: Your Honor, we are merely trying to establish notice of the condition of that doorway, and I know of no better way to establish notice than to establish that persons prior to that date of this accident have fallen there, and Mr. Huffman—

The Court: Ask him whether he had any notice, he is under oath.

Mr. Langerman: Did you have any notice prior to the time of this— prior to February 11th, 1946, Mr. Huffman, of any unsafe conditions in the doorway of the First Avenue side of the Newberry Store, the First Avenue entrance of the Newberry Store? A. No, sir.

Mr. Langerman: We have nothing else at this time. [13]

Mr. Linton: No questions.

(The witness was excused).

Mr. Langerman: Mrs. Etta Crandall. [14]

ETTA CRANDALL

was called as a witness in her own behalf, and being first duly sworn, testified as follows:

Direct Examination

Mr. Langerman:

Q. Will you state your name?

A. I don't hear you.

(Testimony of Etta Crandall.)

Q. Will you state your name?

A. Etta Crandall.

Q. Are you one of the plaintiffs in this case?

A. I am.

Q. On or about the 11th day of February, 1946, Mrs. Crandall, did you have occasion to go into the Newberry Store here in Phoenix, Arizona?

A. I did.

Q. How long had you been in Phoenix prior to that date?

A. We arrived here on Friday, the 8th.

Q. The 8th of February?

A. That is right.

Q. Had you ever been in Phoenix prior to that time? A. I had not.

Q. Had you ever been in the Newberry Store prior to the occasion to which we now refer? [15]

A. No.

Q. What was the purpose of your going into Newberry's Store? A. To get some tissues.

Q. Can you tell the Court what entrance you entered as you entered into Newberry's Store?

A. On the Washington.

Q. And did you purchase any tissues, Mrs. Crandall?

A. I did not. I was told they didn't have any.

Q. Approximately what time of the day was that, Mrs. Crandall?

A. Well, some time before noon.

Q. And after being told that there were no tissues, what did you do?

(Testimony of Etta Crandall.)

A. I walked on out to the rear, the side entrance on First.

Q. Is that the entrance on First Avenue?

A. That is right.

Q. And did you walk out of the doorway of that exit?

A. I started to.

Q. And then what happened?

A. Well, all at once my left foot was insecure. I don't know what happened, and I tried to reach and grab something and I just kept going into space. [16] Apparently, I struck something.

Q. You stated that your left foot was insecure, Mrs. Crandall. To the best of your ability, will you tell the Court what caused that insecurity?

A. Well, I just seemed to strike something or slip in some way. I couldn't explain how, just as I struck that threshold there.

Q. Now, by "threshold" you mean the threshold in that doorway?

A. Yes, sir.

Q. And after striking the threshold in the doorway, what happened?

A. Well, I just kept groping and trying to reach—headlong into space, and there I was on the walk.

Q. Did you succeed in holding onto something?

A. I couldn't find anything apparently. I just felt as though I was hurled.

Q. What happened then?

A. I was so badly injured apparently I couldn't rise. I knew it was in my hip or leg somewhere.

(Testimony of Etta Crandall.)

Q. What happened after you fell, Mrs. Crandall?

A. Well, several rushed up to me and I really can't remember who took me in, but someone, though, carried me in. They put me up in a chair and I scarcely talked, and I begged them not to take me [17] upstairs, because someone insisted on it. I said, "Please don't move me again, but they insisted on carrying me up some way, one or two flights, I don't know.

Q. Were you alone when you entered the Newberry Store? A. I was.

Q. Had you come to Phoenix alone?

A. No, my husband.

Q. He was with you? A. Mr. Crandall.

Q. And where was he at the time all of this was going on?

A. He was at the lobby of the San Carlos.

Q. And was he informed of what had happened?

A. Well, I managed to ask someone to please page him over there. He was waiting for me because he was not able to go out and find—he was going to find a new place to free us, rather, from that hotel if we could.

Q. I neglected to ask, Mrs. Crandall, what was the occasion for your having come to Phoenix?

A. In the first instance, well, Mr. Crandall had been ill, extremely ill, in September, and for many weeks he couldn't go on at all, and finally the doctor there suggested that he try a [18] little stay in

(Testimony of Etta Crandall.)

Phoenix, get a lot of sunshine. He had pleural pneumonia.

Q. You say he had been ill in September?

A. Well, that is when he was ready to leave the hospital.

Q. And from September until February 11th, the date of this accident, was he hospitalized or was he out of the hospital?

A. He was at home but I had to take care of him day and night because he was unable to wait on himself to amount to anything. He could get out and walk around a little bit but he could not accomplish anything either sitting or lying down.

Q. Now, returning, Mrs. Crandall, to the day of the accident. After you had been taken upstairs were you subsequently taken some other place?

A. Over to the St. Monica's.

Q. And how were you taken there?

A. Ambulance.

Q. And were you under the care of a physician there? A. Dr. Cohen.

Q. Now, prior to the time that Dr. Cohen undertook to take care of you, had you ever known him before? A. I had not. [19]

Q. Have you ever had any acquaintance of any sort with him? A. No, sir.

Q. How did you happen to select him?

A. Well, I knew nothing about it. I was almost unconscious by that time. I really didn't know who

(Testimony of Etta Crandall.)

he was, or, someone, one of the nurses, I suppose was the head nurse, said that he was a good surgeon.

Q. Returning again for the moment to what happened up at Newberry's Store. Describe again how you walked out of that door.

A. Well, I just started out in my natural way.

Q. Were you expecting any obstruction of any sort in the doorway? A. No.

Q. Prior to the time of this accident was there anything—did you have any defects of any sort in your walking? A. None whatever.

Q. Do you have any defects of any sort with your eyes? A. No, sir.

The Court: We will have our morning recess at this time. During the recess, ladies and gentlemen of the jury, you are not to discuss this case [20] among yourselves or permit anyone to discuss it with you, also avoid forming or expressing any opinion upon any subject connected with it. The Court will stand at recess for five minutes.

(Thereupon a short recess was taken, after which all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Etta Crandall resumed the witness stand and testified further as follows:

Q. Mrs. Crandall, you stated that you have no defects with your eyes. You do wear glasses, do you not? A. I have worn them a long time.

Q. Were you wearing them at the time of this accident? A. Yes.

(Testimony of Etta Crandall.)

Q. And with those glasses is your vision normal?

A. Supposed to be, yes, sir.

Q. Mrs. Crandall, as you walked out of the Newberry Store, what rate of speed were you walking at, was it a normal rate of speed, faster than normal, slower than normal?

A. Going, I would say, just what would be normal. I was not in any particular hurry. [21]

Q. In other words, you just walked out in a normal manner? A. Oh, yes.

Q. How old were you, Mrs. Crandall, at the time of that accident? A. 68.

Q. What was the condition of your health prior to the time of the accident? A. Very good.

Q. As a result of this fall, Mrs. Crandall, did you suffer any injuries? A. Any injuries?

Q. Yes. A. My hip was broken.

Q. And were you hospitalized? A. I was.

Q. How long a period were you hospitalized?

A. 11 weeks.

Q. Were you permitted to be up and around during that time, Mrs. Crandall?

A. I had casts.

Q. You had a cast?

A. A cast for nine weeks and then I laid there three weeks longer.

Q. And during all of that time the doctor who cared for you was Dr. Cohen? [22]

A. That is right.

(Testimony of Etta Crandall.)

Q. In addition to Dr. Cohen's care, did you find it necessary to have the care of any private nurse?

A. At the end of two or three weeks he said I would not get along unless I had a special, so we paid a special nurse for eight weeks.

Q. That was the balance of the time that you were in the hospital? A. Up to that time.

Q. When you left the hospital did you then dispense with the private nurse?

A. No, we had to take one back home with us.

Q. Where is your home, Mrs. Crandall?

A. Hudson, Michigan.

Q. How did you get back to your home?

A. Ambulance to the train. They had to take me into a drawing room and I had this girl with me, this nurse.

Q. By "this girl" you mean the nurse?

A. The nurse.

Q. She traveled with you?

A. Yes, took her back home and had her there three weeks. I was in bed a month after that.

Q. At your home? A. That is right. [23]

Q. When you got off the train did you—what means of transportation did you use to get to your home?

A. Well, we left the train at Chicago, and the ambulance from Hudson came to take us home.

Q. Mrs. Crandall, in your complaint you have alleged that you suffered—that you were made sick and lame and that you were permanently disabled

(Testimony of Etta Crandall.)

by this fall. Will you tell the Court in what respects you were rendered disabled by this fall?

A. Well, this left leg is shorter, but the rotation, I have lost perhaps half the rotation of the left leg.

Q. Is that the present condition of the left leg?

A. That is the present condition.

Q. Are you able to perform at the present time the duties you were able to perform prior to this accident?

A. Not the same. I will never be able to because I can't raise that foot or bend the same way. In going upstairs it is very difficult. I have lost half the power of lifting.

Q. As a result of the injuries which you suffered, did you have any pain? [24]

A. At the time?

Q. At any times.

A. Oh, extreme.

Q. When was that; will you describe it?

A. In the hospital.

Q. Mrs. Crandall, prior to the time that this accident occurred, you have stated you were taking care of your husband?

A. Yes, sir.

Q. Did he require the care of someone?

A. Well, he did in this way, he could just about sit up a little bit and lie down, and I had to get him special meals, and I do all of the errands anyway. He wasn't out of the house for months.

Q. After you were injured, did anybody take care of your husband?

A. I did.

Q. After your injury?

A. Oh, no, I misunderstood that.

(Testimony of Etta Crandall.)

Q. Did he have anybody take care of him?

A. Well, he was in the hospital also.

Q. What day did he enter the hospital?

A. The same day.

Q. Do you know what the purpose was of his entering the hospital? [25]

A. Well, I would say because he was unable to go out in a room and get his—the food that he would need, or do any errands for himself because he was not going about like that.

Q. In other words, Mrs. Crandall, the accident to you made it necessary for him to also go to the hospital to have someone take care of him?

A. That is right.

Q. And prior to that time you were doing that yourself? A. I was.

Mr. Langerman: That is all.

Mr. Linton: No questions.

(The witness was excused). [26]

Mr. Langerman: Mr. Crandall.

MERTON L. CRANDALL

was called as a witness in his own behalf, and being first duly sworn, testified as follows:

Direct Examination

Mr. Langerman:

Q. Please state your name.

A. Merton L. Crandall.

Q. Are you one of the plaintiffs in this case?

A. I am.

Q. And you are the husband of Mrs. Crandall?

A. That is right.

(Testimony of Merton L. Crandall.)

Q. Were you with your wife on the 11th of February, 1946, Mr. Crandall, when she went to the Newberry Store?

A. I was not with her at that time.

Q. Where were you at that time?

A. I was at the San Carlos Hotel in the lobby waiting for her to get through with her shopping.

Q. How long had you been in Phoenix prior to that time?

A. That was the third day here. We came here on the 8th.

Q. Had you ever been in Phoenix prior to [27] that time?

A. No, sir.

Q. What was the occasion for your coming to Phoenix, Mr. Crandall?

A. On the recommendation of my physician at home in Hudson.

Q. Had you been ill? A. Yes, I had.

Q. What is your occupation, Mr. Crandall?

A. Well, I am retired at the present time.

Q. What was your occupation prior to the time you were retired?

A. I was a mechanical engineer.

Q. How long have you been an engineer?

A. Oh, approximately 26 or 25 years. I wouldn't know exactly.

Q. In the course of your work as an engineer, Mr. Crandall, have you had occasion at any time to work with various types of metals?

A. I worked on practically all types of metals.

(Testimony of Merton L. Crandall.)

Q. Over how long a period?

A. Well, on my engineering and educational period, training.

Q. In other words, during this entire period you worked with various types of metals?

A. Yes, I would say so, but I have been in [28] production work, working for factories and manufacturing concerns practically all my life.

Q. Are you very familiar with various types of metals?

A. Well, to a certain extent. I am not a metallurgist or a chemical engineer, but I have always worked in metals. That has to do with mechanical engineering, of course.

Q. On February 11th, 1946, were you informed of an accident which your wife had had?

A. Yes, I was.

Q. In response to that information, did you go to the Newberry Store?

A. I did, yes, sir.

Q. Are you familiar, Mr. Crandall, with the condition of the doorway on the—with what the condition of the doorway on the First Avenue side of the Newberry Store was on February 11, 1946?

A. I am familiar with it. If that is First Avenue, but I am not acquainted very well with the street, but I suppose that is the one.

Q. Can you describe—oh, go ahead.

A. It is the rear door.

Q. Can you describe the condition of that doorway at that time?

(Testimony of Merton L. Crandall.)

A. Well, the door is set back from the sidewalk [29] approximately two feet, I wouldn't know exactly, and then there is a threshold where the door is located. That threshold is made up of three metal sections, being anchored there with screws, and there were some pieces chipped out of that threshold.

Mr. Linton: Your Honor, I'd like to make an examination on voir dire.

Q. What time of day was it you made that examination?

A. What time of the day? Well, I wouldn't know what time of the day I made it.

Q. Was it before or after your wife had the accident?

A. Well, it was after she had the accident. I would have no reason to look at it otherwise.

Mr. Langerman: Q. The only time you visited that store on that day was immediately after the accident, was it not? A. That is right.

Q. When your wife went to the hospital immediately after the accident, you went with her, did you not? A. I did.

Q. Will you continue now with your description of the condition of that threshold? [30]

A. Well, there were some corners chipped out of some of those plates where they were joined together, and the ends where they come right up should be flush all the way like one solid piece, that is the object of making it in three sections, of course, when they put them down there, they are

(Testimony of Merton L. Crandall.)

supposed to match them up perfect without any steps. I mean by that, the two ends won't match. In other words, they are cocked like that, (illustrating), and then the corners stuck up and those plates aren't even, and those had been kicked and walked on, and so forth, until they are chipped off.

Q. Did you examine the chips very carefully, Mr. Crandall?

A. Well, the chips were gone, I didn't see them, but the holes were still there.

Q. I mean the holes which you have just described, did you look at those?

A. Sure, yes, sir.

Q. Were you able to tell from that examination and from your experience with various types of metals whether those chips were of a recent origin or old origin? A. They are—

Mr. Linton: Your Honor, I object to this. I [31] don't know what type of metal it is. If he is trying to qualify him as an expert and trying to talk about the type of metal, as an expert witness, I think there should be some foundation laid as to what type of metal it is.

The Court: I don't know.

The Witness: I don't know how a person would be able to tell the type of material. It is a casting of some kind. It looks like cast iron. That is what it looks like.

Mr. Langerman: Q. Were you able to state from

(Testimony of Merton L. Crandall.)

your examination of that—will you read that question to him?

(The question reading, “Were you able to tell from that examination and from your experience with various types of metals whether those chips were of a recent origin or an old origin,” was read by the reporter).

A. It was of old origin.

Mr. Langerman: Q. How were you able to determine that, Mr. Crandall?

A. Any metal that is broken out that is of recent origin, it has what we call a bright surface.

Q. Bright surface?

A. Bright—b-r-i-g-h-t, and after that metal stands for several weeks or months, the moisture in the air will make it oxidize, turn first a kind of rusty color. It will be that way for quite a long time, and then it keeps getting darker, darker and darker, and there was absolutely no bright surface on that metal.

Q. What was the color?

A. It was very dark. I wouldn't say what color, but it was a dark color.

Q. Will you describe again, Mr. Crandall, the joinder of the various pieces of metal? Will you amplify that further for the Court?

A. Well—

Q. Are you able to illustrate that at all to the jury by taking various objects and joining them together?

(Testimony of Merton L. Crandall.)

A. Well, I will say this. You have two surfaces. Now, that threshold, it is not exactly a crown, but it is a little high. It was high in the center, and then it curves out, which is proper construction—

Q. If we would get you two books or two objects—

The Court: Could you make a drawing on the blackboard.

A. I think so.

The Court: I don't understand that myself. I don't know whether the jury does. [33]

A. In other words, I could make—I will make an end view of that, as near as I can. Say that is the floor and that is the threshold, it has got a little step on it; that is, it is a little—probably three-eighths of an inch high. Now, the center is probably three-quarters of an inch. Now, if you would go and lay another piece right up against that, it should be exactly the same, the same contour.

Mr. Langerman: Q. By "exactly the same", Mr. Crandall, you mean the same height?

A. The same height and everything, this height and the length and this curve and the radius should be exactly the same, which, no doubt, is what it was originally, but when it was constructed, in as much as being like that, this next piece set like this—I am exaggerating it a little so you can see it—like that, (demonstrating). This is quite evident that that metal is higher, it was not set the way it should be, and I think now, because—I would say that the reason that is broken out of there would be on ac-

(Testimony of Merton L. Crandall.)

count of the constant traffic over it, people and the public traveling over it and kicked it and kicked it, and eventually that corner has been taken out of there, it has been broken out. There is three places like that in [34] that doorway on that threshold.

Q. Where are those three places?

A. Well, in plain view; this is inside of the store.

Q. You have drawn three pieces, Mr. Crandall. Do you mean to indicate there is three pieces of metal?

A. There is three pieces of metal in that threshold, and this center one is longer than the two end ones. There is a piece broken out right here at that corner, and there is a piece broken out of this one. That is a big one, and another one broken out of here (indicating). That is the way it looks and that is the way it has been.

Q. You say that is the way it looks, Mr. Crandall, is that the way the ledge now looks today?

A. Well, I don't suppose it has changed very much. I looked at it again since I have been here, and it looks to me as though some of these are a little larger than they were before.

Q. There are no new broken places in it?

A. No, sir.

Q. And that is the only change in the present condition of that ledge from what it was on the day of the accident?

A. Yes, sir. I might say that this threshold has

(Testimony of Merton L. Crandall.)

little bitty corrugations in it, about an eighth of an inch wide, but that is a good design. It is supposed to make the thing more safe.

Q. Mr. Crandall, does this ledge *to up and down* like a step, or is it curved?

A. Well, it is practically the way I have it shown right here (indicating on blackboard).

Q. You mean it curves?

A. Well, yes, it curves. There is a raise like this, but there is a step on each side there that anyone could get or catch their toe or heel on it even though it is brand new. Maybe it is all right to set it that way, I don't know. If I was designing it, I would have this pinned down where the radius would be on the floor level instead of a little rise there.

Q. Is the threshold in the form of what you would refer to as a crown?

A. Yes, I'd call it a crown threshold.

Q. What does that mean?

A. Well, "crown" means it has a rise on it; not necessarily a rise, but it has a crown so that the center of it is higher than the—

Q. Mr. Crandall, does that threshold, other than the fact that it is metal, differ in appearance very much from the normal threshold of a doorway building; is it the same? [36]

A. Well, it is approximately the same contour.

Q. And it is a curved sort of affair?

A. That is right.

Q. But this one is metal?

A. Yes, sir.

(Testimony of Merton L. Crandall.)

Q. Now, Mr. Crandall, were the three pieces of metal joined together in a smooth, flush manner?

A. Sir?

Q. Were the three pieces of metal that formed that ledge joined together in a smooth, flush manner?

A. No, sir; they were not.

Q. How were they joined together? You see, Mr. Crandall, it is a little hard to tell on that drawing, because there are—there is no depth to that drawing, and that is why I suggested you use something that has depth to it, to illustrate what you mean by the statement they were not smooth and flush.

A. Well, if I had a book or a couple of pieces of wood here I could tell you.

Q. Would these objects help you, Mr. Crandall, in illustrating (handing books to the witness)?

A. Yes, I think so. I might say this, that this is the way they are supposed to be. You are supposed to have— [37]

Q. In other words, they are supposed to be smooth?

A. They are all supposed to be like that, you see, all smooth and match up. Instead of that, this, well, say this piece has dropped down like that, which leaves a shoulder, and they don't match up, and that makes this point stick up higher up here. That is the way that is. These high corners here have been kicked and walked on until, I'd say in our terms, have crystallized, and these chunks have broken right out, and where those are

(Testimony of Merton L. Crandall.)

broken off—that depth here is about an inch and a half or an inch and three quarters. One of them, in fact, is two and three-eighths inches deep. That depth there is from one-half to three-quarters of an inch deep where those corners are broken out. It is not a very safe construction to have it in like that.

Q. Now, from time to time in giving this description, Mr. Crandall, you have referred to “safe construction.” Are any or all of the defects that you have described defects in the construction of this ledge, or are they defects which resulted from factors other than the manner in which they were constructed?

A. I don’t know as I just quite understand your question.

Q. You have described, Mr. Crandall, at least two types of defects in that particular ledge. You have described certain chipped out places and you have described the failure of the various pieces to be smooth and even. Now, are those particular defects, or either of them, defects in the construction of that ledge, or are they caused by some other factor? Which, if either of them, are defects in constructed? [38]

A. I would say it was the assembly of them.

Q. The assembly of them? A. Yes, sir.

Q. Would those defects, both the chipped out places and the uneven fittings, been caused by way of that assembly?

(Testimony of Merton L. Crandall.)

A. No, the uneven fittings caused the corners to chip out.

Q. Those uneven fittings, you would say, were in there from the time the article was assembled, whenever that was? A. Yes, sir.

Q. Mr. Crandall, it has been now over two years since the accident in question, has it not?

A. Yes, sir; it has been over two years. [39]

Q. How are you now able to remember when you first examined that particular ledge?

A. Well, I examined it that very day, just as soon as—I won't state when, but I examined it the very day of the accident.

Q. Have you had your deposition taken in this case, Mr. Crandall?

A. Yes, I had my deposition taken.

Q. At the time of that deposition were you asked whether you had examined the ledge on that door?

A. Yes, but I was so confused and nervous, because I had never been up against—

Mr. Divelbess: I don't know the object of this line of testimony, but it seems to me he is anticipating some matter here. It seems to me it is objectionable.

The Court: Yes. We might not even hear about the deposition. He may explain it when the time comes, if necessary.

Mr. Langerman: Q. What happened, Mr. Crandall, after your wife was taken to the hospital; did you go there with her? A. Yes, I did.

(Testimony of Merton L. Crandall.)

Q. And when she had left there did you leave the hospital?

A. No, I stayed there at the hospital. [40]

Q. What was the reason for your staying at the hospital?

A. Well, I was just getting over pleural pneumonia and I was not able to get up and move around and find a place. I was a perfect stranger here. Neither of us had ever been here before.

Q. Were you able to take care of yourself at that time? A. Well, not too much.

Q. Had anyone been taking care of you prior to this accident?

A. No, Mrs. Crandall had been taking care of me.

Q. For how long a period had that been going on?

A. Well, from the first of September—last August or the first of September.

Q. Prior to the first of September was anyone taking care of you?

A. Well, after I had pleural pneumonia I was in the hospital with it for two weeks and then I was taken home and Mrs. Crandall took care of me until then, until I could get up to where I could travel, and the doctor said—the doctor advised me to try the Phoenix, Arizona, climate.

Q. And you then entered the hospital on the same day your wife did? A. Yes, sir. [41]

Q. And you became a patient there?

A. That is right.

(Testimony of Merton L. Crandall.)

Q. And you had not been a hospital patient prior to that time subsequent to the previous September, is that right? A. That is right.

Q. How long did you remain in the hospital?

A. Eleven weeks.

Q. You remained the same amount of time as your wife? A. That is right.

Q. As a result of the injuries which your wife suffered, Mr. Crandall, did you incur certain medical and hospital expenses?

A. Yes, during the time—yes, when I was there.

Q. Who was your wife's doctor while she was in the hospital? A. Dr. Cohen.

Q. Were you also being visited by any physician while you were in the hospital?

A. Yes, Dr. Cohen.

Q. Mr. Crandall, I hand you this paper. Will you tell the Court what it is?

A. St. Monica's Hospital Health Center, Inc., Phoenix, Arizona. It is a statement—South Fifth Avenue. [42]

Q. A statement for services rendered?

A. To Etta Crandall.

Q. Etta Crandall, that is your wife, the plaintiff in this case? A. Yes.

Q. And what amount is that? A. \$697.55.

Q. And did you pay that bill, Mr. Crandall?

A. Yes, sir.

Mr. Langerman: I'd like to have this marked for identification.

(Testimony of Merton L. Crandall.)

(The document was marked as Plaintiffs' Exhibit No. 1 for identification.)

Mr. Langerman: I offer this in evidence, your Honor.

The Court: Have you seen this, Mr. Linton?

Mr. Linton: Let me see it.

Mr. Langerman: I believe he has a copy of it, your Honor, although he may not have seen this. Will you mark this, please?

(The document was marked as Plaintiffs' Exhibit No. 2 for identification.)

The Court: It may be received.

(Thereupon Plaintiffs' Exhibit 1 for identification was received in evidence.)

Mr. Langerman: I hand you Plaintiffs' Exhibit 2 for the purpose of identification, and ask you what that is, Mr. Crandall. [43]

A. It is a statement from the St. Monica's Hospital Health Center, Inc., 120 South Fifth Avenue, Phoenix, Arizona.

Q. What is that statement for?

A. For services rendered Merton L. Crandall.

Q. And what is the amount of that statement?

A. \$476.05.

Q. And has this amount been paid by you?

A. Yes, sir.

Mr. Linton: No objection.

Mr. Langerman: We offer this in evidence, your Honor.

The Court: All right, it may be received.

(Testimony of Merton L. Crandall.)

(The document was received as Plaintiffs' Exhibit 2 in evidence.)

Mr. Langerman: Q. In addition to the hospital bills in question, were there certain ambulance bills? A. Yes, sir; there were.

Q. And what were those?

A. Well, we had Mrs. Crandall taken to the hospital, the St. Monica's Hospital in Phoenix. I think that was \$7.50, and then we took her from the hospital to return to the train, and it cost \$10 for the ambulance, and when we got in Chicago we had the ambulance come for us from Hudson, and that was \$50.

Mr. Langerman: Will you mark this?

(The documents were marked as Plaintiffs' Exhibits 3 and 4 for identification.)

Mr. Langerman: Q. I hand you Plaintiffs' Exhibit 3 for identification, and ask you what that is, Mr. Crandall.

A. That was the statement from the people that took us to the hospital in an ambulance from the Newberry Store.

Q. What amount is that? A. \$7.50.

Q. That is the first ambulance that you referred to? A. That is the first one, yes, sir.

Mr. Langerman: I'd like to offer this in evidence, your Honor.

(The document was received as Plaintiffs' Exhibit 3 in evidence.)

Mr. Langerman: Q. I hand you Plaintiffs'

(Testimony of Merton L. Crandall.)

Exhibit 4 for identification, and ask you what that is.

A. Well, that is the \$10 that we paid for the ambulance to take her from the St. Monica's Hospital to the train here in Phoenix. [45]

Mr. Langerman: I'd like to offer this in evidence, your Honor.

(The document was marked Plaintiffs' Exhibit 4 in evidence.)

Mr. Langerman: Q. Do you have any receipt for the \$50 ambulance?

A. I didn't get a receipt for that because it was late in the evening when we arrived and I asked him how much the bill was, and he said \$50, and I paid him the cash.

Q. Each of those other items, Mr. Crandall, you have actually paid, is that right?

A. Yes, sir; they are all paid.

Q. In addition to the items already enumerated, do you have certain expenditures for nurses, private nurses to which your wife referred earlier?

A. Yes, we had to have a private nurse in the hospital on the advice of our doctor.

Mr. Langerman: Mark this.

(The document was marked as Plaintiffs' Exhibit 5 for identification.)

Mr. Langerman: Q. These are cancelled checks for the nurse. I hand you Plaintiffs' Exhibit 5 for identification, and ask you what these are?

A. Well, those are checks that I gave to the nurse, the special nurse that we had in the hospital.

(Testimony of Merton L. Crandall.)

Q. Was there only one nurse, Mr. Crandall?

A. We had just one special nurse and she had to be out for two weeks, and there was another nurse, I don't remember if it was two weeks or not, but she was gone for a period of time and she had a substitute.

Q. At any event, Mr. Crandall, all of those checks represent the payment made by you to this one nurse? A. That is right.

Q. And this nurse is the nurse that attended your wife? A. That is right.

Q. And these are what amounts, Mr. Crandall?

A. Well, this is \$56, \$48, \$56, \$56, \$56, \$56, \$40, \$16.

Mr. Langerman: I'd like to offer this in evidence, your Honor.

The Court: Very well.

(The documents were received as Plaintiffs' Exhibit 5 in evidence.)

Mr. Langerman: Q. In addition to the nurse whose payments are covered by those checks, Mr. Crandall, there were other nurses? [47]

A. Well, we had to have a nurse go with us when we went home.

Q. How much time did she spend with you?

A. Four weeks.

Q. And how much pay, did she receive?

A. Well, I paid her \$25 a week, and I gave her—

Q. For four weeks? A. For four weeks.

Q. A total of \$100?

(Testimony of Merton L. Crandall.)

A. Yes, sir; and she had me give her board and room.

Q. You paid for her board and room?

A. I paid her carfare from here to Chicago and also the ambulance from Chicago home.

Q. How much did her carfare from here to Chicago cost you?

A. Well, I don't remember what the fare was from here to Chicago, sir.

Q. Do you remember approximately what it was—how did you go?

A. We went by train.

Q. And how did you travel on that train?

A. We went in a—

Q. You went how, Mr. Crandall?

A. Three room, or a three room compartment, Pullman. [48]

Q. Can you estimate approximately how much, to the best of your recollection, how much did that nurse's train fare cost you, Mr. Crandall?

A. It would be carfare from here to Chicago. Of course, we had our return tickets, and, of course, I had to turn those in.

Q. I am not referring now to the amount you spent for your own fare or your wife's, Mr. Crandall, I am referring to the amount spent for the nurse.

A. Well, I'd say it would be around \$65.

Q. Did you buy her meals for her on the train?

A. Yes, sir.

(Testimony of Merton L. Crandall.)

Q. Over how long a period was that?

A. Sir?

Q. How long a period did you take, approximately?

A. Well, I'd say approximately two days and two nights.

Q. In addition to the money spent for the nurse in taking her back and the amount spent at your home, and in addition to the amounts represented by these cancelled checks, were there some other moneys spent for nurses for your wife? You mentioned, I believe, Mr. Crandall—

Mr. Linton: I object, your Honor, trying to lead the witness. Let the witness answer the question.

Mr. Langerman: I withdraw that question.

Q. You mentioned, Mr. Crandall, that for a period of time the nurse whose name is on these cancelled checks was out and was replaced by another nurse?

A. That is right.

Q. Did you make any payments to that nurse?

A. I gave her a check for it, I believe. The possible amount of that I just can't recall.

Q. Do you know the amount—

A. I would say—pardon me—but I believe her check is in that other bundle of checks, the one that took her place. I think it is the last one in there.

Q. Did you make payment to her?

A. I paid her the same rate that I paid the other nurse. I think it was for two weeks.

Q. What was that rate?

(Testimony of Merton L. Crandall.)

A. I paid this nurse \$56 a week.

Q. \$56 a week, and you had this nurse for two weeks?

A. That is right.

Q. Now, in addition to the items already listed, Mr. Crandall, did you have certain medical, doctor's expenses?

A. Yes, sir. [50]

(Thereupon a document was marked Plaintiffs' Exhibit 6 for identification.)

Mr. Langerman: Q. I hand you Plaintiffs' Exhibit 6 for identification, and ask you what those are.

A. Well, those are checks that I issued to Dr. Cohen.

Q. In payment for medical services rendered to you and your wife?

A. That is right.

Mr. Linton: I didn't get that last answer.

(The last question and answer were read by the reporter.)

Mr. Linton: I object to that, your Honor. I believe that the medical services should be confined to Mrs. Crandall and not the medical services paid for Mr. and Mrs. Crandall.

The Court: The objection is sustained.

Mr. Langerman: Q. Do you know which of these checks represents the fee for the services rendered Mrs. Crandall, or what amount of those checks?

A. Yes, I know what they are.

Q. Will you tell that to the Court?

A. Well, the check for \$286 was for Mrs. Crandall and the \$100 was a check for myself. [51]

Mr. Linton: Your Honor, I still make the same

(Testimony of Merton L. Crandall.)

objection. The checks for Mr. Crandall, for medical expenses, should not be permitted here.

The Court: Well, I agree with you.

Mr. Langerman: Can we split those up, your Honor, and offer the other ones in evidence?

The Court: All right.

(Thereupon check for Mrs. Crandall in the sum of \$286 was marked as Plaintiffs' Exhibit 6-a in evidence.)

Mr. Langerman: Q. In addition to the fee paid to Dr. Cohen, has your wife, since the time of this accident, secured the services of any other physician as a result of her injuries received in this accident?

A. Well, we had our physician at home check her up twice after we arrived home.

Q. What charge, if any, did he make?

A. His cost was \$3.50.

Q. There were two of those?

A. That is right.

Q. Has there been any other doctor or medical bills?

A. Well, she has had to go to a chiropodist.

Q. How often has she had to do that?

A. On account of her leg being short, it affects her feet, and so forth. Well, I would say about every six or eight weeks.

Q. And what amounts, if any, have you expended in payment to the chiropodist?

A. Well, in the original—it was five dollars, and altogether I would say that probably \$40.

(Testimony of Merton L. Crandall.)

Q. In other words, the total—

A. \$45 total.

Mr. Langerman: The total is approximately \$45.

The Court: We will suspend at this time until 2:00 o'clock. Keep in mind the Court's admonition.

(A recess was thereupon taken.)

2:00 o'clock, P. M. April 6, 1948.

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

MERTON L. CRANDALL

resumed the witness stand and testified further as follows:

Mr. Langerman: The defense may cross examine now. [53]

Cross Examination

Mr. Linton:

Q. Mr. Crandall, how soon after your wife went to the St. Monica's Hospital did you go over—did you go to the St. Monica's Hospital in the ambulance with your wife? A. I did, yes, sir.

Q. How long were you there, Mr. Crandall?

A. I was there 11 weeks.

Q. And were you a bed patient there?

A. No, sir, I was not a bed patient entirely.

Q. Pardon? A. I was not entirely, no.

Q. How long was it that you were there before you were able to get out of bed and walk around?

A. Well, I was what they call a floor patient

(Testimony of Merton L. Crandall.)

practically all the time I was in there. I was able to be up.

Q. And did you remain at the hospital premises all the time Mrs. Crandall was there?

A. Yes, sir.

Q. Did you at any time leave the hospital premises while you were there? A. Yes, sir.

Q. And when was the first occasion that you left the hospital grounds? [54]

A. Well, I wouldn't know, I don't remember.

Q. Well, was it approximately eight weeks?

A. Well, it is hard to tell, sir. I wouldn't know when it was. I didn't try to keep any record of that.

Q. Mr. Crandall, you recall on January 29th, 1948, at one o'clock on Thursday of that week that you went to an address at 714 South Hill Street, Los Angeles, California, at which time you were under oath and gave a deposition to an attorney by the name of George R. Haswell?

A. Yes, sir.

Q. And you recall that was pursuant to a stipulation between Mr. Langerman and myself that you gave that deposition? A. Yes, sir.

Q. And in that deposition, I will ask you if you recall this question, on Page 26, beginning with Line 21: "Question: Approximately how long was it before you started going out, to the best of your recollection?" And your answer—"Well, I would say it was close to eight weeks." Is that correct?

(Testimony of Merton L. Crandall.)

A. Well, I suppose, probably, that is approximately correct, yes, sir.

Q. In other words, up until eight weeks—[55] in other words, from the time immediately following the accident until you first left the hospital grounds, it was probably eight weeks?

A. I would say that is right, after I went to the hospital.

Q. In other words, that would be around the first part of April, 1946? A. Yes, sir.

Q. Up until the first part of April, 1946, you stayed in the hospital and the hospital premises?

A. All the time, that is right.

Q. About what percentage of the time did you stay in bed?

A. Well, I spent quite a lot of time in bed. I was up and down. I don't know, but I spent quite a lot of time there because that is where I thought I should be.

Q. In other words, I believe after you got to the hospital you were ill and apparently had to have medical attention?

A. Well, I had been getting it at home and I was getting it there too some when it was necessary.

Q. In looking over Plaintiffs' Exhibit 2, the bill that you received from the St. Monica's Hospital, I find that there are such items as this: G.I. Series, \$25; G.I. Check, \$15; Routine, \$5; [56] C.B.C., \$3.50, and drugs, \$41.55. Do you recall those items and those checks or examinations?

(Testimony of Merton L. Crandall.)

A. Well, were those for me personally, you mean?

Q. Well, I will show you this for your convenience, Mr. Crandall, (handing document to witness). On this statement there are five items other than the room. A. Oh, I see.

Q. G.I. Series, \$25; G.I. Check, \$15; Routine, \$5; C.B.C., \$3.50, and drugs, \$41.55.

A. Well, I can remember paying those, but I would say yes.

Q. In other words, those were caused by your own illness? A. Yes, that is correct.

Q. In other words, then the only items on there as to your hospitalization was the item of 64 days at \$5, and 12 days at \$5.50?

A. Yes, that would be right.

Q. Now, Mr. Crandall, did you become sick to where you needed medical attention shortly after you went to the hospital?

A. Well, it was some of that, yes, I did, yes, while I was in the hospital.

Q. And you were treated by doctors other than Dr. Cohen also, were you not? [57]

A. That is right.

Q. In other words, for the first several weeks there you were really a bed patient, were you not?

A. Well, no, I would say not because I was what they call a floor patient, walking patient.

Q. You were receiving medical treatment?

A. Yes, that is true.

Q. Now, I believe you said you had been in

(Testimony of Merton L. Crandall.)

Phoenix for a period of approximately three days before February 11th? A. That is correct.

Q. And that you stayed at the San Carlos Hotel at that time? A. No, sir; we were in a motel.

Q. Do you remember the name of the motel?

A. The Rose Bowl, we stayed the first night and that is all we could stay, and then we had to move to another one where we could stay three nights, and they said we could go back to the Rose Bowl and stay another night. We stayed the second night, I can't recall the name of it, we were there two nights.

Q. How did you come from your home in Michigan to Phoenix, by car, train or plane?

A. We came by train.

Q. And then you and your wife came out on the [58] train together? A. Yes, sir.

Q. Did you have a drawing room or a compartment to travel that way? A. Yes, sir.

Q. Now, do you remember how much you paid for your night's lodging at the Rose Bowl Motor Court? A. It seems to me it was five dollars.

Q. Five dollars. Then in addition to that you had to pay for meals, of course?

A. That is right, yes, sir.

Q. In other words, this rate at the hospital at \$5 a day where you got your meals was really cheaper than your motor court, wasn't it?

Mr. Langerman: We object, your Honor, it is speculative.

(Testimony of Merton L. Crandall.)

The Court: Well, it is argument, you can argue that to the jury.

Mr. Linton: It will speak for itself. Now, Mr. Crandall, how long were you in the store of the J. J. Newberry Company, the day that your wife fell? A. How long was I in there?

Q. Yes.

A. Well, I was in there just long enough until the ambulance could arrive and got my wife. [59]

Q. In other words, you and your wife went on in the ambulance to the hospital?

A. Yes, sir.

Q. That is, in other words you stayed there for about eight weeks, then?

A. That is right.

Q. Referring to the deposition which I reported to you a few moments ago? A. Yes, sir.

Q. I will ask if you weren't asked this question and gave this answer, on Page 2, the question on Line 14; a question by Haswell: "Mr. Crandall, have you ever had your deposition taken before?" Answer: "I have not." Question: "Just so you will understand the nature of the proceeding, I will tell you this: We are sitting around here rather informally, you have been sworn by the reporter, and your testimony will have the same force and effect as if you were testifying in court. It is not my intention to ask you any trick questions, but merely to find out what you know about the facts of this case. Now, if you should testify differently, the defendants in the case would have

(Testimony of Merton L. Crandall.)

the right to call that to the Court's attention. I mean by 'testifying differently', I mean at the time of trial if you should testify [60] differently. So, if you don't understand a question that I ask, if you will ask me to repeat it, I will be glad to do so. Now, you further understand, do you, Mr. Crandall, that this is being taken by written stipulation signed by your attorneys, is that right? Answer: Yes, I understand." Do you remember that question and that answer? A. Yes, sir.

Q. And referring to the deposition on Page 11, beginning with Line 16: "Question: Now, at that time when you were at the Newberry Store, did anyone tell you where the accident happened? Just answer it yes or no, Mr. Crandall. Answer: No." Do you recall that question and that answer?

A. I don't just exactly recall that question and answer.

Q. Well, I will ask you some more questions, Mr. Crandall: the next question on Line 20. "Question: Did anyone later tell you where the accident happened? Answer: Yes, they did later." Do those refresh your memory as to those two questions and answers?

A. Well, I was—will you please read that question again?

Q. Yes. "Did anyone later tell you where the [61] accident happened? Answer: Yes, they did later."

A. What do you mean by "later?"

Q. Well, I will read—

(Testimony of Merton L. Crandall.)

A. I mean the first question that you asked there, I said I didn't remember. I'd like to have you read that again.

Q. All right, the question on Line 16: "Now, at that time when you were at the Newberry Store, did anyone tell you where the accident happened? Just answer it yes or no, Mr. Crandall. Answer: No."

A. Yes, they did.

Q. Then your answer of "no" at the time of the deposition is incorrect?

A. Yes, sir; it is incorrect because—I will tell you how that—when that question was asked I was just confused and nervous and I just—my mind was foggy and I really couldn't recall. I tried hard to, but after we left there and got through, I talked it over with the Missus and she says, "Well, don't you remember what happened that day, and you talked it over, and so forth, and told me about it, and so forth," and it came to me that I did. I looked that place over when—

Q. That is not the question, Mr. Crandall. In other words, you said that no one on that day, [62] in your deposition, you said no one on that day showed you where the accident happened.

A. Well, they did.

Q. And do you know who it was?

A. No, I don't know who it was, because I wanted to know immediately what happened and where, and I was told, and I went there right then,

(Testimony of Merton L. Crandall.)

at that very moment before the ambulance got there, and I viewed that doorway.

Q. And you left your wife—

A. She was upstairs. They took—carried her upstairs.

Q. I will ask you further questions and answers following on Page 11, Line 26, continuing on Page 12: “Question: Now, on the day that you were there, did you make any examination of the premises? Answer: Well, I took a look at the place where they said she fell.” Do you recall that question and answer?

A. That is what I did. I took a good view of it to see. I couldn’t imagine why she had fallen in a place like that. I didn’t know what happened, and I went there to take a look at it, yes, sir.

Q. Do you recall the following questions and answers starting on Line 4 of Page 12: “Question: On the first day you were there? Answer: No it [63] couldn’t have been the first day. Question: I am speaking now of the time when you went to see Mr. Crandall after they called you on the phone. Answer: No, I didn’t take a look at it. Question: You didn’t take a look at that time? Answer: No, sir. Question: At that time you were interested in getting Mrs. Crandall to the hospital? Answer: That is what I wanted to do, was get some help for her right then.”

Mr. Langerman: That was not read correctly.

Mr. Linton: What?

Mr. Langerman: Line 13.

(Testimony of Merton L. Crandall.)

Mr. Linton: "Answer: That is what I wanted to do, was get some help for her right then." Is that right?

Mr. Langerman: Yes.

Mr. Linton: "Question: And later you did go back to the store? Answer: Later, I went back and took a look at the place. Question: Now, with reference to February 11th, 1946, when was that? Answer: You mean when I went to look at it? Question: Yes. Answer: I wouldn't know when it was that I went to look at it. Question: And have you looked at it more than once? Answer: Yes. Question: Well, now, the first time you looked at it was that close to the time [64] that Mrs. Crandall went to the hospital? Answer: Well, it was just a few days after. Question: You would say it was a few days afterwards? Answer: I would say that it was, oh, well, within ten days. Question: Within ten days? Answer: I would say it was within ten days. Question: That is your best recollection at this time? Answer: As I can remember it, yes. I took a look at it." Do you remember those questions and those answers, Mr. Crandall?

A. Yes, I do remember some of them.

Q. And do you recall at that time you were giving the deposition you were under oath?

A. Yes, I realized that.

Q. And you have changed your story today?

A. Well, as I say, I was so nervous and confused and they popped questions at me so fast, it is just hard for me to concentrate and know exactly

(Testimony of Merton L. Crandall.)

what to say as I look at it. But—another place there I made the statement that I looked that place over the very day while I was waiting for the ambulance to come, to see what happened, where the trouble was.

Q. Now, at the time this deposition was taken you and your wife were present, and the court reporter, and Mr. Haswell, is that right? [65]

A. Yes, sir.

Q. Just the four of you in the room, and I will ask you if at the same time the following questions were asked and the following answers given on Page 15, beginning with Line 21, referring to the step: “Question: Where is the step? Answer: I wouldn’t say just where that is, but as I remember it, there is a step down there. I believe that it doesn’t slope down like a lot of the doors that are set back. Some of them sloped down to the sidewalk, but I believe that this one comes out, and then there is a step. I don’t believe it slopes all the way to the sidewalk. Question: Now, when you examined this entrance within ten days, the first time you examined it, which you say you believe it was within ten days of the accident— Answer: Yes, I believe it was within ten days of the accident. Question: When you examined that, what did you see, if anything? Answer: Well, there were a couple of holes in the—I would call that a threshold for the door. That is what I would call it. It is a place set in the floor and it is two or three sections, and there were two holes in that

(Testimony of Merton L. Crandall.)

threshold. Question: And where were those two holes? Answer: Well, there was one on each side.

Question: And were they on [66] the inside of the threshold or outside of the threshold? Answer:

They were right on the threshold. Question: You mean they ran all the way across the threshold?

Answer: No, no. One of them looked as though there was a piece broken off of a section. A little piece was broken out of the section of the threshold. And the other hole looked to me, as I remember it, to be a round hole, not deep. It was a shallow hole, but it looked like a hole there for a bolt or something to lock a door, to lock a door. That is what it looked like." Do you remember those questions and those answers?

A. Yes, sir.

Q. And do you remember at that time, on January 29th of this year, you testified that there was a hole that looked like a bolt fitted in and one other hole in threshold?

A. I remember that, yes, sir.

Q. That is all that was present at that time, was it not?

A. That is the way I remembered it.

Q. In other words, Mr. Crandall, what we are trying to get here is which is correct at the time you examined it, either at the time of the accident or ten days later, where were these holes? In this [67] deposition you have referred to the one hole other than the bolt hole, and then in your testimony

(Testimony of Merton L. Crandall.)

you referred to three. At which time is your statement correct?

A. Well, they are correct where I sketched them this morning, that is where they are now.

Q. And then your deposition was not correct?

A. Well, that deposition is—was taken some time, a long time after I looked at that, and it is hard for a person to remember exactly what the picture is.

Q. Mr. Crandall, isn't it true that in December of last year, December, 1947, that you examined the premises?

A. I looked at them then, that is correct.

Q. This deposition was taken in January, 1948?

A. Yes.

Q. Approximately a month later.

A. Yes, sir.

Q. And you had recently viewed the premises just a month before this deposition?

A. Approximately.

Q. Have you gone over this deposition with your attorneys? A. No, sir.

Q. You never talked to them about it at all? [68]

A. No, I have never been over it.

Q. Now, on page 21, I will ask you if you recall the following questions and answers, beginning on Line 20: "Question: You didn't see anything wrong with that area between the door, the threshold and the sidewalk? Answer: No; no, I

(Testimony of Merton L. Crandall.)

looked at that and it seemed to be perfectly okay.”
Was that question and answer correct?

A. Yes, sir.

Q. I will ask you this question and answer that we asked you at the deposition, on Page 29, the question on Line 2: “Question: Now, when you examined it in December of 1947, were these holes you have told about still there? Answer: Yes, they are still there. Question: They are still there? Answer: I know one of them was, and I will say that they were both there, yes.” Do you remember that question and that answer?

A. Yes, sir.

Q. In other words, in December, 1947, when you viewed the premises, you only noticed one hole at a place where the door fitted down into the threshold? A. I said two, didn't I?

Q. Well, one hole that you saw was an irregular hole and a hole that set where the door fastened into the threshold? [69]

A. That was my impression at that time, yes, sir.

Q. That was in December, 1947?

A. That is right.

Q. And you examined it at that time?

A. That is right.

Q. And isn't it true that your memory is more likely to be correct in remembering of an occasion for three or four months, than two years and two months?

Mr. Langerman: That is argumentive.

(Testimony of Merton L. Crandall.)

The Court: Yes, that is also argument.

Mr. Linton: Q. I believe you testified on direct examination, Mr. Crandall, that you were in the lobby of the San Carlos Hotel at the time your wife fell? A. That is right.

Q. Mr. Crandall, have you examined the entrance to the J. J. Newberry Company since you have been in Phoenix in this month?

A. Yes, sir.

Q. And when did you make that examination?

A. This morning.

Q. This morning? A. Yes, sir.

Q. And that is the last—the first time you [70] have seen it since December, 1947?

A. Yes, that is right.

Q. And your testimony today is based on what you saw there this morning, is it not?

A. Not necessarily, no, sir.

Mr. Linton: No further questions.

Redirect Examination

Mr. Langerman:

Q. Mr. Crandall, Mr. Linton, among other things, read you a series of questions which I believe started on, covering Page 12 and a part of Page 13, but in any event, ended with this question which he read to you: "That is your best recollection at this time?" And the answer was: "As I can remember it, yes, I took a look at it." Has anything happened since the time of this deposition to refresh your memory or to in any way change

(Testimony of Merton L. Crandall.)

your recollection of the condition of that ledge at the time of the accident?

A. Well, the general appearance has not changed.

Q. That was not the question I asked, Mr. Crandall. I said has anything happened since the time this deposition was taken which would enable you to recall a different picture than the one you recollected at the time this deposition was taken? [71]

A. I don't understand your question.

Q. Well, following this deposition, Mr. Crandall, did your wife, after leaving the place where this deposition was taken, discuss the deposition?

A. Oh, well, surely, yes, we did.

Q. And did you, at one point in that discussion, recall a conversation which you had had with Dr. Cohen?

A. Yes, yes, we did.

Mr. Linton: Your Honor, I am going to object to the leading form of those questions. I don't mind Mr. Crandall testifying, but I'd rather Mr. Langerman ask him the questions.

Mr. Langerman: I was merely trying to refresh his memory. I would be perfectly willing to let him testify what the conversation was, but he obviously was not able to understand what I was driving at.

Q. When did that conversation take place with Dr. Cohen, the one to which I have just referred?

Mr. Divelbess: Just a minute. He didn't testify that he had a conversation with Dr. Cohen.

(Testimony of Merton L. Crandall.)

Mr. Langerman: I believe he testified having had a conversation with Dr. Cohen.

Mr. Divelbess: I think you testified to that, Mr. Langerman. [72]

The Court: Yes, I think so. Why doesn't he just say he was mistaken the first time?

Mr. Langerman: What is that?

The Court: Why doesn't he say he was mistaken when the deposition was taken?

Mr. Langerman: Well, I think he is going to get around to that, your Honor. I just want him to point out what it was.

The Court: Well, whatever it was, something occurred to change his mind. What difference does it make?

Mr. Langerman: I think it is quite important, your Honor.

The Court: Well, then, let him testify to it and not you.

Mr. Langerman: All right. Will you read the last couple of questions?

(The last two questions were read by the reporter).

Mr. Langerman: Q. When did this conversation with Dr. Cohen, do you recall, take place?

A. Well, it was at the time of the accident, right there, when he asked me how it happened, and I told him.

Q. Did you tell him how the accident happened? A. Well, yes. [73]

Mr. Linton: Your Honor, I object. I don't think

(Testimony of Merton L. Crandall.)

there is any evidence that Mr. Crandall saw the accident happen. How could he give that testimony?

Mr. Langerman: Q: In the course of that conversation with Dr. Cohen, was any mention made of the condition of the doorway?

Mr. Divelbess: I object to that question as leading.

Mr. Langerman: I am merely leading up to the subject, your Honor.

The Court: That is what he is objecting to.

Mr. Divelbess: That is it.

The Court: Yes, the objection is sustained.

Mr. Langerman: Q. Well, now, amplify further, Mr. Crandall, as to what was the nature of that conversation with Dr. Cohen?

A. The Doctor asked me how it all happened and—

Mr. Linton: Your Honor, I will make the further objection to any explanation by this witness of how something happened that he didn't see.

Mr. Langerman: We are merely trying to establish what he said, not to prove it is the truth, but to prove that on that very day he said something. The defendants can introduce all the evidence they want as to the effect of what he said was or was not [74] true. We are merely trying to establish what was said then on the day of the accident.

Mr. Linton: Your Honor, I think it is immaterial.

Mr. Langerman: I think it is very material

(Testimony of Merton L. Crandall.)

what was established then. They have put into issue in this case when this man first looked at that ledge. I think it is very material that on the day in question he had some conversation relating to that ledge then. I think that is very material. I think the mere fact that he had such a conversation ought to be introducable in evidence, and I am not trying to establish what he said is or is not true.

Mr. Linton: I certainly object to the form of the question, your Honor.

The Court: I don't know. People make statements in depositions and they may be mistaken as to the time and correct it later. All he has to do is say that he made the statement. People make mistakes.

Mr. Langerman: Your Honor, I realize that, but I think the credibility of the witness, as far as the jury is concerned, is greatly affected if they are convinced he was mistaken or he had changed his story. I just want them to know, that is the thing, that he was mistaken. [75]

Mr. Linton: I believe, your Honor, counsel is bringing out entirely new testimony, attempting to bring out entirely new testimony rather than what was brought out before.

The Court: He doesn't know anything about how the accident happened except what somebody told him.

Mr. Langerman: I am asking him about that ledge.

(Testimony of Merton L. Crandall.)

The Court: If you will read the last question and answer, you will find out.

(The question and answer was read by the reporter).

The Court: He doesn't know how the accident happened except what somebody told him.

Mr. Langerman: Q. Mr. Crandall, are you now sure at this time that you first—as to when you first examined that ledge? A. Yes, sir.

Q. When was that?

A. It was the very day that the accident happened.

Q. And how do you know that that is so; how do you know now?

Mr. Linton: I object. A person knows or he doesn't know. How he knows is a mental process. [76]

Mr. Langerman: Q. Has your memory been refreshed on that point, Mr. Crandall, as to when it was that you first examined that ledge?

A. No, no, I know when it was.

Q. At the time this deposition was taken, did you know?

Mr. Divelbess: Oh, I object to this. It is immaterial and has been asked and answered.

Mr. Langerman: It has not been answered. They have very carefully kept him from answering.

The Court: Well, he knew, he was bound to have known if he knew later. He forgot momentarily.

Mr. Langerman: Q. When you testified as to

(Testimony of Merton L. Crandall.)

the condition of the ledge, Mr. Crandall, that testimony was the condition of the ledge at the time of the accident, is that right? A. Yes, sir.

Q. Your testimony is not a description of what you saw today? A. No, sir.

The Court: Well, how does what you say today differ from what you said on the 11th of December?

A. Well, the only difference I can say, sir—Judge, is possibly those breaks and holes in there might be larger.

The Court: All right. [77]

A. The general look—the general picture of the thing is the same as it was at that time.

Mr. Langerman: You may have the witness.

Mr. Linton: No questions, your Honor.

The Court: That is all.

(The witness was excused).

Mr. Langerman: Your Honor, we have Dr. Cohen, who is on his way here. Meanwhile, I think we could put Mrs. Crandall back on. We have one or two questions to ask her.

The Court: All right.

ETTA CRANDALL

was recalled as a witness in her own behalf, and having been heretofore duly sworn, testified further as follows:

Direct Examination (Resumed)

Mr. Langerman:

Q. Mrs. Crandall, on this day of this accident,

(Testimony of Etta Crandall.)

prior to the time that you reached the doorway of the First Avenue entrance to Newberry's, did anything unusual happen to you. A. No.

Q. Did you in any way slip or slide or fall prior to the time you reached the doorway?

A. No. [78]

Q. When you reached that doorway, Mrs. Crandall, did you in any way slip or slide?

Mr. Divelbess: I object to the question as leading.

The Court: Yes. You may answer.

A. May I answer?

The Court: Did you slip or slide?

A. I didn't slip or slide, no. My foot struck something, struck something solid, just hurled me right out, my left foot.

Mr. Langerman: Which foot was it?

A. My left.

Q. What happened to your left foot?

A. Well, I just fell, I just struck right against something like an obstruction or something sticking up.

Q. And then your fall, Mrs. Crandall, as I understand it, was not caused by slipping or sliding?

A. Absolutely not.

Mr. Langerman: That is all.

Cross Examination

Mr. Linton:

Q: Mrs. Crandall, on direct examination this morning I believe you used the expression that at

(Testimony of Etta Crandall.)

[79] that doorway your left foot felt insecure, did you not?

A. Well, perhaps I did. I don't know now.

Q. Did you further state you didn't know what happened?

A. Well, I know that is what happened. My foot struck something. I couldn't have fallen like that.

Q. Did you see your foot strike anything?

A. Did I what?

Q. Did you see any obstruction?

A. Well, no, I can't say that I saw it that quickly. I felt it.

Mr. Linton: That is all.

Mr. Langerman: That is all.

(The witness was excused).

MATTHEW COHEN

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

Mr. Langerman:

Q. Will you state your name, please?

A. Matthew Cohen.

Q. What is your occupation? [80]

A. Physician and surgeon.

Q. What training, if any, have you had, Doctor Cohen, that would qualify you as a physician and surgeon?

A. Well, the usual training.

Q. What does that consist of?

(Testimony of Matthew Cohen.)

A. Oh, High School.

Q. Did you attend Medical School?

A. Yes, sir; eight years of college and then internship.

Q. Are you licensed to practice in the State of Arizona? A. Yes, sir.

Q. How long have you practiced in the State of Arizona? A. About eight years.

Q. Are you acquainted with the plaintiff in this case, Mrs. Etta Crandall? A. Yes, sir.

Q. Did you attend Mrs. Crandall and take care of the injuries which she sustained on or about February 11th, 1946? A. Yes, sir.

Q. Prior to that time were you acquainted with either Mr. or Mrs. Crandall. A. No sir. [81]

Q. Your only acquaintance with them is in connection with the services which you rendered?

A. Yes, sir.

Q. When you examined Mrs. Crandall as of April 11th, what, if anything, ailments or injuries did she have?

A. She had a broken hip, broken left hip.

Q. And what treatment, if any, did you render for that broken hip?

A. We had confined her to bed and inserted a nail or wire through in the ankle to which we could attach some weights to pull the left leg down.

Q. How long was Mrs. Crandall under your care? A. About two to three months.

Q. What was her condition at the end of that time, Dr. Cohen?

(Testimony of Matthew Cohen.)

A. She was able to get about on crutches.

Q. Was she recovered? No, sir.

Q. Have you since that time examined Mrs. Crandall? A. Yes, sir.

Q. When have you last examined her?

A. She was up to my office yesterday afternoon.

Q. Can you tell the Court what is the present condition of Mrs. Crandall's hip and leg? [82]

A. Well, she has about an inch of shortening in the left lower extremity. She has stiffness in both the left hip and the left knee. She is unable to use her hip properly, turning her leg in or turning it out. She can't flex it, or, in other words, bring her knee up, which is disabling when she goes to climb stairs. I would say she has about, oh, 33⅓ per cent permanent total disability of her left lower extremity.

Q. On the occasion when you first saw Mrs. Crandall, do you know how long it was approximately after she had received her injuries?

A. I saw her the same day, I believe.

Q. Was her husband, Mr. Crandall, there too?

A. Yes, sir.

Q. Did you have any conversation with Mr. Crandall?

Mr. Divelbess: I object to that as immaterial. That does not prove any issue in this case at all.

The Court: I don't think it does.

Mr. Langerman: I didn't hear the ruling, your Honor.

The Court: I say, I don't think it does.

Mr. Langerman: Q. Have you had previous ex-

(Testimony of Matthew Cohen.)

perience with the type of injury that Mrs. Crandall had? [83] A. Yes, sir.

Q From your experience with those injuries, in your opinion, does such an injury result in any pain or suffering? A. Yes, sir; quite a bit.

Q. From your examination of Mrs. Crandall yesterday, in your opinion, has her recovery been a normal one or abnormal one?

A. I'd classify it as a fair recovery.

Mr. Langerman: You may ask—you may cross examine.

Cross Examination

Mr. Linton:

Q. Do you know Mrs. Crandall's age?

A. I don't know it offhand, sir.

Q. Well, at the time of the accident, did you know what her age was, approximately?

A. I believe so.

Q. Would you say it was around 68 to 70?

A. At times it is dangerous to wonder about a woman's age. I believe you are right though.

Q. Did you carry out any leg raising test for her left leg yesterday? A. Yes, sir.

Q. And did you carry out any with her right leg? [84] A. Yes, sir.

Q. In other words, a person of her age, Doctor, with the leg raising test, they are not as active as a person 30 years younger?

A. Almost, very little different.

Q. There is some difference?

A. Very little.

Q. In other words, you would expect some dif-

(Testimony of Matthew Cohen.)

ference after that? A. I believe you would.

Mr. Linton: No further questions, your Honor.

Mr. Langerman: May the witness be excused, your Honor?

The Court: That is all.

(The witness was excused).

Mr. Langerman: The plaintiff rests, your Honor. [85]

DEFENDANT'S CASE

Mr. Divelbess: We would like to make a motion at this time, your Honor.

The Court: All right, in the absence of the jury?

Mr. Divelbess: Yes, your Honor.

The Court: All right, (addressing the jury), you will retire from the courtroom and remain out in the corridor for a few minutes. You will answer to the call of the bailiff.

(Thereupon the jury was excused from the courtroom).

Mr. Divelbess: At this time, your Honor, we move the Court to direct a verdict for the defendant upon the ground that there is no evidence that the accident was due to any negligent act or omission of the defendant or its agents, and upon the further ground that there is no evidence of any faulty construction of the doorway that in any way caused the accident. There is no evidence that the defect, if it did exist there, was known to the

defendant, or that it existed for a sufficient length of time to cause the defendant to have notice of it; upon the further ground that the evidence, such as there is, shows that the alleged [86] defect was as obvious to the plaintiff as it was to the defendant, and, therefore, there was no duty upon the part of the defendant to apprise the customers of any condition existing in the doorway, and upon the further ground that there is no definite evidence as to what caused the plaintiff's fall.

I don't know whether your Honor cares for me to go into all the evidence—

The Court: There is enough to take the case to the jury. I shall so rule.

Mr. Divelbess: You will recall the plaintiff said—

The Court: I recall everything that has been said. She said her foot slipped over some obstruction. I think it would be a good idea to send the jury down to look at that.

Mr. Divelbess: We have no objection to that.

The Court: All right.

Mr. Divelbess: Certainly, where there is no definite evidence of what caused the plaintiff to fall, that leaves the matter entirely to conjecture on the part of the jury.

The Court: All right. She said her foot struck something. Now, what did it strike?

Mr. Divelbess: That is it, what did her foot [87] strike?

The Court: There wasn't anything else there.

Mr. Linton: Well, your Honor, I will—

The Court: There is enough to take it to the jury, I am satisfied about that. I don't want to hear any more argument.

Mr. Linton: The Court wishes the jury to view the premises?

The Court: Don't you think it is a pretty good idea? Do you have any objection?

Mr. Linton: We have no objection.

Mr. Langerman: None whatsoever, your Honor.

Mr. Brown: Your Honor please, would the Court have in mind that the jury view the premises before the arguments? It probably would make the argument, such as it is, more intelligent to them.

The Court: I will wait until you are finished with the evidence. It is time for the afternoon recess anyway. We will have a brief recess.

(Thereupon a short recess was taken, after which all parties, as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Linton: Mr. C. C. Huffman. [88]

C. C. HUFFMAN

was recalled as a witness, and having been heretofore duly sworn, testified on behalf of the defendant as follows:

Direct Examination

Mr. Linton:

Q. Your name is C. C. Huffman?

A. That is right.

Q. And I believed you testified you have been

(Testimony of C. C. Huffman.)

manager of the Newberry Store for about 14 years? A. Right.

Q. How long has the Newberry Store been located in its present location? A. Since '27.

Q. In other words, it was a new building built, though between '27 and the present time?

A. In 1938.

Q. And the present store then was built in '38?

A. Yes, sir.

Q. Were you in the store, Mr. Huffman, at the time of Mrs. Crandall's injuries?

A. I was not.

Q. Did you arrive at the store that day?

A. Yes.

Q. Do you know approximately how long it was after she had fallen? [89]

A. Around 15 or 20 minutes.

Q. Where was Mrs. Crandall at that time when you returned to the store?

A. I believe she was upstairs.

Q. Now, Mr. Huffman, have you had occasion to examine the First Avenue entrance to the Newberry Store many or a few times in the past eight years?

A. I have occasion to examine that every morning when I unlocked the door.

Q. In other words, you opened the store yourself? A. I opened that particular door.

Q. I will ask you, Mr. Huffman, if at the present time the metal threshold plate that Mr. Cran-

(Testimony of C. C. Huffman.)

dall testified to is in the approximate condition as he testified there with those three chips in?

A. It is at the present time, yes.

Q. And do you know when those three chips first appeared?

A. I noticed it the first time when I returned from my vacation in July, the first part of July, '47.

Q. Last year? A. That is right.

Q. And prior to July of last year, had you at any time noticed any chips in the metal threshold? [90] A. I had not.

Q. And you have seen it every day?

A. That is right.

Q. And did you examine the metal threshold or doorway on the date of the alleged fall, February, 1946? A. No, sir.

Q. Did you examine it particularly thereafter to see whether or not there was any defect in the threshold? A. No, I didn't.

Q. You have seen it how often since then?

A. I have seen it every day.

Q. Prior to returning from your vacation in '47, had you ever noticed one or two chips or any number of chips in the metal threshold?

A. Well, I noticed the chips in July, '47, after returning from my vacation.

Q. Mr. Huffman, do you know what caused those chips to appear?

A. No, I couldn't say definitely unless it was the stress or strain, settling of the building.

(Testimony of C. C. Huffman.)

Mr. Linton: You may cross examine.

Mr. Langerman: We have no questions.

(The witness was excused).

Mr. Linton: Call the witness Joe Scott. [91]

JOE SCOTT

was called as a witness on behalf of the defendant,
and being duly sworn, testified as follows:

Direct Examination

Mr. Linton:

Q. Your name is Joe Scott? A. Yes.

Q. What is your occupation, Mr. Scott?

A. I am an engineer, surveyor.

Q. Are you associated with some engineering
firm in the City? A. Yes.

Q. What is the name of that firm?

A. Yost & Gardner Engineering.

Q. I believe you are a registered land surveyor?

A. Yes.

Q. I will ask you whether or not, if on March
13th, 1946, you had occasion to make a survey of
the First Avenue entrance to the J. J. Newberry
Company? A. I did.

Q. What did you do at that time when you went
to that store?

A. Well, we measured all of the entrance there
in order to make a map showing the condition. [92]

Q. Did you take measurements? A. Yes.

Q. And were those measurements later reduced
to a drawing? A. Yes, the next day.

(Testimony of Joe Scott.)

Mr. Linton: Please mark this for identification.

(The document was marked as Defendant's Exhibit A for identification).

Mr. Linton: Q. I will show you Defendant's A for identification and ask you if that represents the conditions as you saw them at the building, and the construction as you saw it on March 13th, 1946.

A. Yes, sir.

Mr. Linton: We offer this in evidence, your Honor, as Defendant's Exhibit A for identification.

The Court: Any objection?

Mr. Brown: No objection, your Honor.

(The document was received in evidence as Defendant's Exhibit A).

Mr. Linton: Q. In other words, Mr. Scott, for information here, the scale is one inch to one foot, that is correct? A. That is right.

Q. Mr. Scott, I will ask, so that the jury are better able to understand the drawing here, this area here indicates north, is that right? [93]

A. Correct.

Q. Where is First Avenue in relation to where this arrow is?

A. Well, this is First Avenue over there, (indicating).

Q. In this area in here?

A. That is the sidewalk.

Q. From this heavy line over to the—the edge of the diagram is the sidewalk? A. Yes, sir.

Q. Then this which you have marked "canopy" over the sidewalk, is that the line that extends

(Testimony of Joe Scott.)

over this direction, to here, the one marked "canopy" over the sidewalk and extending east back to the building? A. That is right.

Q. This symbol here says "canopy", about how wide is it? A. 12 feet.

Q. And how long? A. 15.59.

Q. Then this entrance, the blue portion of the diagram, what does that represent?

A. That is granite.

Q. What portion of the step or doorway is that granite? [94]

A. Well, that is the edge of the step.

Q. In other words, just west of the granite is the sidewalk? A. That is right.

Q. Then how wide is this granite strip here?

A. .79 of a foot.

Q. And then what is this checked area east of the granite?

A. That is tile, one inch square tile.

Q. Do you recall whether it has any particular colors?

A. Yes, it is mostly white with red border.

Q. White with red border? A. Yes.

Q. Then what is this shaded pencil area in here? A. Well, that is the metal threshold.

Q. Then east of the metal threshold, what is that? A. That is the floor of the building.

Q. That is inside of the store?

A. Inside of the store.

Q. Now, according to your drawing, how wide is that metal threshold?

(Testimony of Joe Scott.)

A. .56 of an inch, would be about six and three-quarters inches.

Q. Six and three quarters inches wide. [95]

A. Yes.

Q. The white area inside of the metal threshold, what does that indicate?

A. That represents doors.

Q. In other words, there are two doors?

A. Yes.

Q. How wide is this entrance from your drawing? A. Well, it is five feet and 18 inches.

Q. Five feet wide? A. Yes.

Q. According to your drawing, what is the distance from the west edge of this metal plate to the edge of the step?

A. Two feet, point 22—two feet, two and three-quarters inches.

Q. In other words, about 27 inches from that west edge of the plate to the step down?

A. Yes.

Q. Now, I believe you say you made an examination of the premises on March 26th—March 13th, 1946? A. That is right.

Q. A little over two years ago? A. Yes.

Q. Now, in making these measurements, Mr. Scott, did you have to get down on your hands and knees [96] to make any actual measurements?

A. I did.

Q. And when you made those measurements,

(Testimony of Joe Scott.)

before having this drawing made here, did you observe the condition of the metal threshold?

A. Yes.

Q. And could you describe generally what the condition was, and if there was anything wrong with the metal threshold at that time?

A. There was nothing unusual about it.

Q. Were there any chips of any nature off of the metal part of the threshold?

A. I think not.

Q. And have you examined that metal threshold since March of 1946?

A. Yes.

Q. And are there any chips in it at this time?

A. Yes.

Q. And from the best of your memory, did you see those chips there at the time the drawing, the notes for the drawing, were taken?

A. No.

Q. I will ask you if you have had occasion some time this year, I believe you told me, to make a sketch of the metal threshold itself?

A. Yes. [97]

Q. And do you recall approximately when those notes were taken?

A. Around the first of January.

Q. Of this year?

A. Of this year.

Mr. Linton: I'd like to have this marked for identification.

(The document was marked as Defendant's Exhibit B for identification).

Mr. Linton. Q. I will ask you if Defendant's B for identification was taken from the notes you

(Testimony of Joe Scott.)

made in January, 1948, as to the metal threshold and the condition of it at that time? A. Yes.

Mr. Linton: We offer in evidence Defendant's Exhibit B.

Mr. Brown: No objection.

(The document was received as Defendant's Exhibit B in evidence).

Mr. Linton: Q. Now, Mr. Scott, in this Defendant's B in evidence you have two drawings, I believe. Now, what is this top drawing, what does that represent?

A. That is a cross section of the threshold.

Q. A cross section of the metal plate itself?

A. Yes. [98]

Q. And how—I guess you would say “tall”, or how high is the top of the metal plate from the floor level itself? A. Five-eighths of an inch.

Q. Does the metal plate come down to a point flush with the floor level, or is there any raise at that point? A. There is a slight raise.

Q. About how much is that slight raise there?

A. Around an eight to a quarter of an inch.

Q. An eight to a quarter of an inch rise from the floor level, and that is before the actual curve starts? A. Yes.

Q. In your drawing here you show three spots on this lower part of Defendant's B, three spots on the threshold. Will you describe to the jury what they are?

A. Those represent the breaks that are there now, or at the time this was made.

(Testimony of Joe Scott.)

Q. I believe you have the date on your drawing as January 3d, 1948, is that correct?

A. Yes.

Q Now, I believe the drawing on the right edge of it shows two chips opposite each other. About how far are those chips from the door jamb itself? [99]

A. They are a foot and four inches.

Q. And then there is a chip in the left drawing, one chip, and what distance is that from the other doorjamb?

A. The same distance.

Q. Is there any chip in the middle section of that plate?

A. No chip.

Q. And in your top drawing here on Defendant's B you show ridges or corrugations, is that what that is in the middle itself?

A. Yes.

Q. Now I will ask you if you have ever seen this type of threshold in other buildings, stores or offices?

A. Yes, I have.

Q. Is that the customary type of metal threshold, is it about the same height of a household threshold?

A. It is.

(Thereupon Defendant's Exhibit B in evidence was handed to the jury).

Mr. Linton: You may cross examine. [100]

Cross Examination

Mr. Brown:

Q. Mr. Scott, are you an employee of Yost & Gardner?

A. Yes, sir.

Q. What were your instructions when you made this sketch now hanging on the blackboard?

(Testimony of Joe Scott.)

A. To get everything in that particular area to show—

Q. Are you through with your answer?

A. Yes.

Q. This sketch is describing the First Avenue entrance of the J. J. Newberry Store in Phoenix, Arizona. Was it your instructions from Yost & Gardner to go out there and make an accurate plat of that entrance?

A. That is right.

Q. This plat is a sketch of the entrance with the doors closed, is it not, Mr. Scott?

A. Yes, sir.

Q. What time of day did you make this sketch?

A. Oh, it was in the morning.

Q. Before the store was open? A. No.

Q. The store was open at that time? What led you to make this sketch with the door closed?[101]

A. Well, merely to show the position of the doors over that threshold.

Q. Now, when you made the sketch which the jury is now examining, Defendant's Exhibit B in evidence, you made that with the doors open, did you not?

A. Yes.

Q. What were your instructions from Yost & Gardner when you made that sketch, Mr. Scott?

A. To get the condition of the threshold.

Q. Now, when you made this sketch, this Exhibit A in evidence, you were merely taking measurements and designating the difference in metals that went to make up this entrance?

(Testimony of Joe Scott.)

A. Well, not necessarily. We were to get anything that showed up in there.

Q. Now, back to the canopy here. Is that a metal canopy? A. Yes.

Q. That is designed to have an awning hanging from it, the lower edge, is it not? A. Yes.

Q. Was the awning in place at the time you made this sketch?

A. I don't recall, but I believe not. That was in the morning. I think it was up.

Q. Mr. Scott, you, yourself, took these measurements on March 13th, 1946? [102]

A. Yes, sir; with the help of another man.

Q. Since then you have been on numerous survey jobs, have you not, and done considerable work? A. Yes.

Q. Is there anything—has anything happened to refresh your recollection about what you saw on March 13th, 1946? A. No, not particularly.

Q. You just remember the details of this job as a job? A. That is right.

Q. Now, Mr. Scott, referring to Defendant's Exhibit B in evidence, the metal threshold is made up of three distinct sections, is it not?

A. Correct.

Q. There is nothing on this sketch to indicate whether or not those three sections are flush with each other, is there?

A. Well, except as they are shown by the drawing.

(Testimony of Joe Scott.)

Q. Yes, they are shown to butt up against each other by the cross section, but you didn't actually unscrew any of those plates? Your cross section was made by measuring the height of the ridge against the level of the floor? [103]

A. That is right.

Q. Therefore, there is nothing on this drawing to show whether or not any two of those sections were flush with each other? I am speaking only of the drawing, Mr. Scott.

A. Well, I don't quite understand what you mean. It shows it to me that it is there.

Q. All right. Would you now say that on January 3d, 1948, when you made this sketch that those three sections were flush, one with another, and were properly fitted?

A. I think so, within good practice.

Q. You are referring to good engineering practice?

A. Well, good construction practice.

Q. Well, in good construction they would be flush, would they not? A. That is right.

Q. Not to a tolerance of one ten-thousandth of an inch, but to a tolerance of maybe—

A. Sixty-fourth or thirty-second.

Q. Maybe a sixty-fourth. As a rule, a thirty-second of an inch would be a sufficient deviation to put on your sketch, would it not? A thirty-second is a pretty large dimension in engineering?

A. No, not so large, it depends on where it is.

(Testimony of Joe Scott.)

Q. Yes, in close fittings.

A. What the purpose is.

Q. In close fitting, metal deviation of a thirty-second of an inch would be enough to have it indicated on this drawing? A. I don't think so.

Q. At any rate, Mr. Scott, what this drawing specifically shows is the dimensions of the threshold, the dimensions of each section of the threshold, that is right, is it not? A. Yes.

Q. And shows roughly the chips out of the threshold without any specific dimensions except as in comparison with the dimensions of the entire pieces?

A. A chip would be rather hard to dimension.

Q. Yes. Mr. Scott, at the time you went out to make this sketch on January 3d, 1948, you had definite instructions to locate the chips in the threshold? A. That is right.

Mr. Brown: That is all.

Mr. Linton: No further questions.

(The witness was excused.)

Mr. Linton: Your Honor, I spoke with counsel for the plaintiffs. There is one witness to be here at ten in the morning, and I thought perhaps you would like to have an early recess. [105]

The Court: Well, under your stipulation that the jury might view the threshold, I think I will let them go this afternoon.

Mr. Linton: It is perfectly all right.

The Court: I will send them down with the

bailiff, and after they have looked this over, they can go on to their homes without returning here. Is that agreeable?

Mr. Linton: Yes, your Honor.

Mr. Langerman: Yes.

The Court: Counsel have stipulated that you may go down and inspect this threshold and view it, the idea being that you would be better able to understand the evidence after you have done this, so you may go down in the custody of the bailiff and counsel will probably go along. You are not to talk to anybody. You probably have all walked through that door thousands of times and never paid any attention to it, and this time you will look at it. You will not discuss the case, as I told you this morning, among yourselves or with anyone else, and you are not to make up your mind on any issue of the case, and after you have gone down and had this view, then you may go on about your business. Report back here tomorrow morning.

Mr. Brown: Your Honor, I request, if the Court please, that the exhibit with respect to the threshold be taken along.

The Court: Oh, they are going to look at the real thing.

Mr. Brown: Very well, sir.

(Thereupon a recess was taken at 3:40 o'clock p.m.) [107]

10:00 o'clock A.M., April 7th, 1948.

All parties as heretofore noted by the Clerk's record being present, the trial resume as follows:

Mr. Linton: Mr. Miller.

HUGH JOHN MILLER

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

Mr. Linton:

Q. Will you state your name, please, sir?

A. Hugh John Miller.

Q. What is your address?

A. 1415 East Garfield, Phoenix.

Q. Mr. Miller, in March of 1946, where were you employed? A. Kunkle Photo Service.

Q. In what capacity?

A. As a commercial photographer.

Q. How long have you been a commercial photographer? A. Approximately eight years.

Q. And how long were you employed by the Kunkle Photo Service? [108]

A. For a period of four to five months.

Q. When did you leave their employ?

A. Oh, April 6th, 1946.

Q. Just about two years ago?

A. Almost that.

Q. After you left their employ did you go in that venture at some other place?

A. Sunland Photo Service.

Q. How long were you there?

A. Oh, approximately a year.

Q. And when did you go over with the Mountain Spring Water Company? A. Last July.

Q. I will ask you whether or not while you were employed by the Kunkle Photo Studios you had

(Testimony of Hugh John Miller.)

occasion to take a photograph of the west entrance to the J. J. Newberry Company Store?

A. That is right.

Q. And do you remember approximately the date that you took that photograph?

A. It was on a Sunday morning and by checking with the studio, the date was the 10th of March.

Q. 1946? A. That is right.

Q. It was Sunday morning?

A. I remember that distinctly. [109]

Q. Do you recall what were your instructions in the taking of the photograph which you were supposed to take?

A. Only the step, photograph the step, the fullest details of the west entrance, the First Avenue entrance.

Mr. Linton: May I have this marked for identification?

(The document was marked as Defendant's Exhibit C for identification.)

Q. I will show you Defendant's C for identification, and ask you if that represents a true picture of the condition of that step and the surrounding area of the west entrance to the J. J. Newberry Company Store as you saw it on March 10th, 1946.

A. That is the same picture, and it is a true condition of the step and area.

Q. And you said that that was taken on a Sunday?

A. Between 7:30 and 8:00 o'clock in the morning.

(Testimony of Hugh John Miller.)

Mr. Linton: We offer this in evidence as Defendant's Exhibit C for identification.

Mr. Brown: No objection.

(The document was marked as Defendant's Exhibit C in evidence.) [110]

Mr. Linton: Q. At the time you took this photograph was the store open? A. No, sir.

Q. Were the doors open? A. No, sir.

Mr. Linton: You may cross examine.

Mr. Brown: We have no questions.

(The witness was excused.)

Mr. Linton: I'd like to recall Mr. Huffman to the stand for one question.

C. C. HUFFMAN

was recalled, and testified further as follows:

Redirect Examination

Mr. Linton:

Q. Mr. Huffman, can you describe generally the condition of the light near the inside of the store, near the west entrance to the store?

A. Well, within a radius of about 20 feet there are nine 300 watt lights.

Q. Now, are they in the ceiling?

A. Three of them are in the ceiling, recessed, and three are dropped.

Q. Now, when are those lights turned on, when are they lit? [111]

A. Turned on when we open the store in the morning at 8:00 o'clock.

(Testimony of C. C. Huffman.)

Q. And you do that every day?

A. That is right.

Q. And can you state then that on the date of this accident those lights were burning?

A. I am positive they were.

Q. That is nine 300 watt lights?

A. That is right.

Q. Do you recall whether or not the same lights are in the position now or were yesterday that were in February, 1946?

A. Yes, the same lights.

Mr. Linton: That is all.

Recross Examination

Mr. Brown:

Q. Mr. Huffman, what is your routine for opening the store?

A. I take care of the side door, and my assistant opens the front doors.

Q. What time do you get down ordinarily?

A. What time what?

Q. What time do you get down in the morning?

A. In the morning?

Q. Yes. [112]

A. Usually about a quarter of eight.

Q. You open the door on the First Avenue side and you go in and then you close the door again, don't you?

A. No, I don't, because I go in the employees' entrance.

Q. You go in—is that the entrance we are talk-

(Testimony of C. C. Huffman.)

ing about, at First Avenue, there is another entrance, isn't there?

A. The entrance going up to the office.

Q. Yes, that is not the entrance we are talking about here? A. No.

Q. And when do you open this side door on First Avenue? A. At eight o'clock.

Q. And do you open them and fix them back so the public can come back and forth?

A. Yes, sir.

Q. At eight o'clock in the morning?

A. Yes, sir.

Q. Who opens the front door?

A. Mr. Turner.

Q. Are there occasions when you come down late?

A. Not very often. I am always there by eight o'clock. [113]

Mr. Brown: That is all.

Mr. Linton: That is all.

(The witness was excused.)

Mr. Linton: The defendant rests, your Honor.

Mr. Langerman: We sent for a witness. I think we will just ask Mrs. Crandall one or two questions until that witness comes.

PLAINTIFFS' REBUTTAL TESTIMONY

ETTA CRANDALL

was recalled as a witness in her own behalf in rebuttal, and having been heretofore duly sworn, testified further as follows:

Direct Examination

Mr. Langerman:

Q. Mrs. Crandall, in addition to being examined by doctors who were selected, were you also at any time examined by any doctors on behalf of the J. J. Newberry Company? A. Yes.

Q. And approximately when did that examination take place?

A. Well, it is about the 15th or 16th of December.

Mr. Linton: What year was that? [114]

A. 194—

Mr. Langerman: Who was the doctor?

A. 1947.

Q. 1947? A. That is right.

Q. Who was the doctor?

A. Dr. Norman Ross.

Q. Is he a Phoenix doctor? A. Yes.

Mr. Langerman: That is all.

Cross Examination

Mr. Linton:

Q. Mrs. Crandall, on the date of the accident do you recall what type of shoes you were wearing, generally the type you have now? A. No.

Q. What type of shoes were you wearing on that date? A. It was a walking shoe.

Q. Beg pardon?

A. A walking shoe, laced, with a military heel.

Mr. Linton: All right. That is all.

(Testimony of Etta Crandall.)

Mr. Brown: Our other witness should be here in about five or six minutes, your Honor.

The Court: Well, we will have to take a recess and go over your instructions [115]

Mr. Langerman: All right, sir.

The Court: The Court will stand at recess for a few minutes.

(Thereupon a recess was taken.)

(After recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

ALVIRA MAGNUSSON

was called as a witness in rebuttal on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

Mr. Langerman:

Q. Will you state your name, please?

A. Alvira Magnusson.

Q. What is your residence, Mrs. Magnusson?

A. 2018 East Pierce.

Q. In Phoenix? A. Phoenix.

Q. What is your occupation?

A. Stenographer.

Q. Where are you employed?

A. Fennemore, Craig, Allen & Bledsoe.

Q. Are those the attorneys? [116]

A. Pardon me?

(Testimony of Alvira Magnusson.)

Q. Are those attorneys, Fennemore & Craig?

A. Yes.

Q. Were you at one time employed by Mr. Brown, one of the attorneys for the plaintiffs in this case?

A. Yes, sir.

Q. Was that on a regular or part time basis?

A. On a part time basis.

Q. And were you at the same time also employed by the same firm which now employs you?

A. Not at that particular time, no.

Q. But you did have other employment.

A. Yes.

Q. How long has it been since you have ceased to be an employee of Mr. Brown?

A. Well, I have worked for him part time up until, oh, maybe six months ago.

Q. On March 20th, 1946, did you have occasion to go to Newberry's Store here in Phoenix, Arizona?

A. I believe it was that day, yes, sir.

Q. What was the reason for your making that particular trip?

A. Well, Mr. Brown wished me to go over and examine the entrance and to attempt to find the eye witnesses to the accident. [117]

Q. To what accident do you have reference?

A. To the accident of Mrs. Crandall.

Q. And in response to his instructions, did you go to Newberry's Store on that date?

A. Yes, sir; I did.

(Testimony of Alvira Magnusson.)

Q. And did you examine the entrance to that store?

A. Yes, I examined the entrance on First Avenue.

Q. And did you examine that particular portion of the entrance?

A. Well, I looked it over and I made some notes and made a report at that time.

Q. Have you looked at those notes since the time you first made them? A. Yes, I did.

Q. Incidentally, when were those notes made by you?

A. Promptly after my return to the office, after having been over to Newberry's.

Q. How recently have you looked at those notes?

A. I looked at them the other day to refresh my memory.

Q. Now, will you tell the Court and jury what you saw when you examined that entrance to the Newberry Store?

A. Well, I noticed on the inner ledge there were two holes. The one to the left was a little bit bigger, and then over where the ridges are joined together, there was a little raised part where it was sort of irregularly joined, and I think it would be very easy for somebody to catch their heel in.

Mr. Divelbess: I move that the last part of that answer be stricken, and the jury instructed to disregard it.

The Court: All right, it may be stricken.

Mr. Langerman: We have no further questions.

(Testimony of Alvira Magnusson.)

Cross Examination

Mr. Linton:

Q. Do you have the notes with you that you made?

A. No, I don't have them with me, but I believe Mr. Brown has them.

(Papers were handed to Mr. Linton by Mr. Brown.)

Mr. Linton: Q. Now, what time of the day was this that you went over there?

A. I believe it was during the afternoon.

Q. And were the doors open or closed?

A. The doors were open.

Q. Can you recall approximately the distance from the threshold to the step, how close was this together?

A. It seems to me it is all in one. There are ridges on the threshold. [119]

Q. Pardon?

A. There are ridges like, sort of metal ridges.

Q. And is that right next to the step?

A. Seems to me it is all in one.

Q. In other words, you step down from the threshold to the sidewalk? A. I believe so.

Q. And you examined that in detail at that time?

A. Well, to the best of my ability. There were people going in and out, you see.

Q. And was there any difference in the color of

(Testimony of Alvira Magnusson.)

the tile, or any colors near the threshold, different from the colors inside of the door?

A. I wouldn't remember that.

Q. You don't recall that? A. No.

Q. Did you observe whether there were any chips on the outside of the metal threshold at that time?

A. I just noticed the chips on the inner ledge on the inside.

Q. That there were two? A. Yes, sir.

Q. And what size were they?

A. Well, that is hard to say. One was a little bit larger than the one on the right. [120]

Q. Well, were they two inches or a half inch?

A. Oh, let's see, I would say,—oh, I would be guessing, maybe nearer an inch, the one.

Q. And where were they located in relation to the center of the metal threshold?

A. They were both, it seems to me, on the seam. There are seams on each side joining that.

Q. When was the last time you examined that area?

A. Well, I glanced at it the other morning.

Q. You mean what morning, yesterday morning?

A. Let's see, what is today, Wednesday? I believe it was Monday morning.

Q. At the request of Mr. Brown?

A. No, I don't think he requested me specially to look at it.

(Testimony of Alvira Magnusson.)

Q. He told you he probably would want you for a witness in this case? A. Oh, yes, definitely.

Mr. Linton: And you checked it then. That is all.

Redirect Examination

Mr. Langerman:

Q. These notes, however, were made on the date indicated here, on March 20th, 1946, were they not?

A. Yes. [121]

Q. And that was immediately after you examined it? A. Yes, and I returned to the office.

Q. Are you acquainted with the Crandalls?

A. No, I am not.

Mr. Langerman: That is all.

Mr. Linton: That is all.

(The witness was excused.)

Mr. Linton: We have no surrebuttal.

The Court: All right, you may proceed with the argument.

Mr. Linton: No surrebuttal, your Honor.

Mr. Divelbess: We wish to renew our motion in the absence of the jury.

The Court: All right.

(Thereupon the jury was excused from the courtroom.)

Mr. Divelbess: The defendant wishes to renew its motion for an instructed verdict, and on the further ground that the alleged defects are so slight as not to constitute negligence as a matter of law.

The Court: The motion is denied. Call the jury.

(Thereupon the jury was recalled and assumed their respective places in the jury box.) [122]

The Court: We will suspend until two o'clock. Keep in mind the Court's admonition.

2:00 o'clock P.M., April 7th, 1948.

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

(Thereupon arguments were presented to the jury by counsel for both sides, after which the Court instructed the jury as follows:)

The Court: It now becomes the Court's duty to instruct you as to the law that applies to this case. Briefly, the issues involved are as follows:

The evidence shows that Mrs. Crandall was attempting to enter the store of the defendant and fell. It is claimed that the defendant was negligent in that said step was not in a safe condition; in that said step had ridges and uneven places in said step; that said step at said time and place was so uneven so as not to afford the plaintiff a sure footing, and as a result of the condition of said step as aforesaid, the plaintiff tripped and fell to the ground; that the unsafe condition of the said doorway and step, as aforesaid, was in existence for a long time prior to the time aforesaid, and was known, or should have been known by the defendant, in that many customers of the defendant had been injured— [123]

Mr. Linton: That was stricken, your Honor.

The Court: That is right.

—that the plaintiff, Etta Crandall's fall was caused by the negligence of the defendant as aforesaid; that as a result thereof, the plaintiff was rendered sick and lame and suffered many bruises and contusions in and about her body, and suffered a fractured hip, and was confined to a hospital and to bed; that said injuries as aforesaid have permanently disabled the plaintiff to her damage in the sum of \$10,000.

The plaintiff, her husband, Merton L. Crandall, also claims damages for the amount of hospitalization and for medical attention that he expended for his wife's cure.

Now, the defendant generally denies the claims of the plaintiff. They deny that the condition of said doorway and step was unsafe and denies each and every, all and singular, the remaining allegations of Paragraph 4 of Plaintiff's complaint. Paragraph 4 is what I have just read to you about the unsafe condition of the step, and in addition, the defendants say that if the plaintiff, Etta Crandall, was injured or damaged, such injuries or damages were caused or contributed to by her own negligence. [124]

Now, I have used the word "negligence" several times, and I will give you the legal definition of it.

You are instructed that negligence is the omission to do something which a reasonably prudent man, guided by those considerations which usually

regulate the conduct of human affairs, would do; or is the doing of something which a prudent and reasonable man would not do. It is not intrinsic or absolute, but is always relative to some circumstances of time, place or person. Negligence is of no consequence unless it was the proximate cause of the injury or damage.

Now, proximate cause of an injury is that cause which, in natural or continuous sequence, unbroken by any effective intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets the other causes in operation.

In determining whether an act was the proximate cause of an injury, the question always is, whether there was an unbroken connection between the wrongful act and the injury, and to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, and that it ought to have been foreseen in the light of the attending circumstances.

By "ordinary care" is meant that degree of care which an ordinarily careful and prudent person would have exercised under the circumstances.

The defendant has plead herein what is known in the law as contributory negligence. You are instructed that any negligence on the part of the plaintiff, Etta Crandall, however slight, which amounted to failure on her part to exercise ordinary care, and which proximately or directly contributed to and caused her fall and injuries result-

ing therefrom, constitutes a complete defense to this action, and if you do believe from the evidence that the plaintiff, Etta Crandall, and the defendant, were both guilty of negligence at the time of her fall, and that the negligence of each proximately and directly contributed in causing the said injuries and the damages complained of, you are not permitted to speculate or inquire as to which of the parties was guilty of the greater negligence, or to determine upon your verdict the result of such injuries, but you are instructed under such circumstances that the law requires you to return a verdict for the defendant. [126]

In order for you to find that the defendant was negligent in the construction or maintenance of the threshold and doorway upon which plaintiff fell, you must first find that the threshold and doorway was dangerous or unsafe for plaintiff's use to the point of involving her to an unreasonable risk, if she were exercising ordinary care. If you find that the threshold and doorway did not subject plaintiff to an unreasonable risk, if she exercised ordinary care, then you will not consider the case further, because the defendant was not guilty of negligence, and you must find for the defendant.

If, however, you find that the threshold and doorway did involve an unreasonable risk to plaintiff, even though she may have been exercising ordinary care, then, in order to hold the defendant liable you must further find that the defendant either had actual knowledge of the unreasonable risk involved, or that such condition had existed

for such a period of time prior to the accident that in the exercise of ordinary care the defendant, its agents or employees, should have recognized it as involving an unreasonable risk to its customers. Therefore, if you find from the evidence that the defendant, its agents or employees, in the exercise of ordinary care in seeing the condition of the threshold and doorway, would not have recognized it as involving an unreasonable risk to the customers, then your verdict must be for the defendant.

The mere fact, however, that the metal threshold was chipped or that the plaintiff tripped on the chipped threshold is no evidence whatever that defendant knew or should have known the threshold was an unreasonable risk to plaintiff. Plaintiff must not only prove the threshold subjected her to an unreasonable risk, but, in addition, she must prove that said dangerous condition was caused from the improper maintenance of the threshold, or that it was out of repair for a sufficient time prior to the accident so that defendant in the exercise of ordinary care should have discovered the threshold involved an unreasonable risk to customers and to have remedied the condition. This is so because a storekeeper is not liable to injuries to his customers for a dangerous condition on his premises where the storekeeper does not have actual knowledge or constructive notice of the danger.

You are further instructed that you are not permitted to guess, speculate or surmise upon whether the defendant was negligent in this case. [128]

You are instructed that the maintenance of a step from the store level to the sidewalk is not negligence, and the plaintiff was under the duty to take notice of the change in levels.

You are instructed that even though you may believe from the evidence that the threshold had chips or other defects in it at the time of Mrs. Crandall's fall, that is not sufficient to entitle plaintiff to recover. In addition, you must find that the chips or other defect in the threshold was such as to involve an unreasonable risk to persons using the doorway in the ordinary care and exercising ordinary care.

Even if you find this to be the case, you must go further and find that the chips or other defect in the threshold were the direct and proximate cause of Mrs. Crandall's fall, since the maintenance of a metal threshold such as this is not of itself negligence.

The legal duty which the defendant owed plaintiff in this case was only to exercise reasonable care to make the threshold and doorway reasonably safe for her use. It was not bound to make the threshold [129] and doorway absolutely safe, but only reasonably so. In order to show want of reasonable care by the defendant, you must find from the evidence that the threshold and doorway at which plaintiff fell was not constructed or was not maintained in a reasonably safe manner and presented an unreasonable risk for plaintiff.

You are instructed that in deciding whether or not the plaintiff, Mrs. Etta Crandall, was guilty of

any negligence which proximately contributed to her injuries, it is proper for you to take into consideration all of the facts and circumstances of the particular case. In this connection, if you find that Mrs. Etta Crandall had never before been on the premises where the accident occurred, and had no knowledge of any defects or chips in the threshold, if any there were on said premises, that she was not bound to exercise as great a degree of care as though she had been aware of the defects or chips on that threshold, if any.

You are instructed that if Mrs. Crandall used the same degree of care for her own safety that a normally prudent and careful person would have used under the same or similar circumstances, that she was not guilty of any contributory negligence.

You are instructed that the owner of a store is liable for harm resulting from dangerous or unsafe conditions in that store or in any portion of those premises over which he has control, even though he had no actual knowledge of these dangerous or unsafe conditions if the conditions could have been discovered by him by reasonable inspection.

The proprietor or the owner of a store is bound to exercise reasonable care to keep his premises reasonably safe as to all portions of the premises over which he has control, whether such portions be within the building or on the outside, and he has the duty of keeping and maintaining this property in a reasonably safe state of repair. He owes this duty to any business invitee. In this connection you are instructed that the term "business

invitee'' includes not only those people who actually enter his place of business and make purchases therein, but also includes all persons who enter his store for the purpose of making purchases whether or not such purchases are actually consummated.

Now, if your verdict should be for the plaintiff, Etta Crandall, if you find that she is entitled to recover, you may award her such damages within the amount claimed in her complaint as in your opinion will compensate her for the pecuniary damages proved to have been sustained by her and proximately caused her by the wrong complained of. [131]

In estimating the amount of such damages, you may consider the physical and mental pain suffered, if any, the nature, extent and severity of her injury or injuries, if any, the extent, degree and character of suffering, mental or physical, if any, its duration and severity, and the loss of time and value thereof.

You may also consider whether the injury was temporary in its nature or is permanent in its character, and from all these elements you will resolve what sum will fairly compensate the plaintiff for the injury sustained.

If you find that the plaintiff is entitled to recover, the measure of her recovery is what is denominated compensatory damages; that is, such sum as will compensate her for the injuries she has sustained.

Now, if you find for the plaintiff Merton L. Crandall, you may award him such sum as he may

have expended for hospitalization and medical expenses which he paid on account of such injuries to his wife, Etta Crandall. [132]

Now, by the giving of that instruction—these two instructions on the measure of damages, you are not to assume from that that the Court says you shall find for either the plaintiff or the defendant. If your finding is for the plaintiff, then you should follow the rule I gave you.

Now, in civil cases a preponderance of the evidence is required, and by a “preponderance of evidence” is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity, or his motives; or by contradictory evidence. In judging the credibility of the witness in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable persons. You should carefully scrutinize the testimony given, and in so doing, consider all of the circumstances under which any witness has testified, his

demeanor, his manner while on the stand, his intelligence, the relation which he bears to the parties, and the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon the credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should discuss his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness's testimony.

There is nothing peculiarly different in the way a jury is to consider the proof in a civil case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment. [134]

Jurors are expected to agree upon a verdict where they can conscientiously do so. You are expected to consult with one another in the jury room and any juror should not hesitate to abandon his own view when convinced that it is erroneous. In determining what your verdict shall be, you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out must be wholly left out of account and disregarded. The

opinion of the Judge as to any issue in the case, if directly or indirectly expressed in these instructions, or any time during the trial, is not binding upon the jury, for to the jury exclusively belongs the duty of determining the facts. The law you must accept from the Court as correctly declared in these instructions.

After you retire to the jury room you will select one of your number to act as foreman and proceed with your deliberations. After you have agreed upon a verdict, in the event you do, you will have it signed by your foreman and return it into open court. Any verdict agreed upon, of course, must be the unanimous verdict of the jury. You may retire now in the custody of the bailiff. Are there any exceptions to the instructions? [135]

Mr. Linton: The defendant objects to the refusal to give defendant's requested instruction No. 4 as requested by the defendant, and objects to the modification on the grounds that the evidence shows that if the chips were present in the threshold and if their presence constituted negligence, there are other areas in the threshold properly maintained and in good order, and that to refuse this portion of the instruction will be to permit the jury to surmise that if she struck some object even in the proper portion of the threshold, the defendant is liable.

The defendant excepts to the giving of Defendant's Instruction No. 5 on the ground that the instruction is proper under the law, and the evidence in the case.

The defendant excepts to the giving of Defendant's Instruction No. 9 as submitted, for the reason that the evidence shows the threshold was constructed in accordance with the ordinary and customary manner of other and similar thresholds and doorways in the locality, and that the instruction is proper under the law and the evidence in the case.

The Court: The record will note the objections. (Thereupon the jury retired to deliberate on its verdict at 3:10 o'clock, P.M. of the same day.)

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 136 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,
Official Reporter.

[Endorsed]: Filed June 15, 1948.

[Endorsed]: No. 11966. United States Circuit Court of Appeals for the Ninth Circuit. J. J. Newberry Company, a corporation, Appellant, vs. Merton L. Crandall and Etta Crandall, his wife, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed July 5, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11966

J. J. NEWBERRY COMPANY, a
corporation,

Appellant,

vs.

MERTON L. CRANDALL and
ETTA CRANDALL, his wife,

Appellees.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND DES-
IGNATION OF RECORD FOR PRINTING

J. J. Newberry Company, a corporation, the ap-
pellant in the above-entitled action, pursuant to
Subdivision 6 of Rule 19 of the Rules of the above-
named Court, hereby presents the following state-
ment of the points on which it intends to rely on
this appeal:

That the Trial Court erred in denying defend-
ant's motion for a directed verdict made at the
conclusion of Plaintiff's case and renewed at the
conclusion of the entire case, upon the grounds,
and for the reasons, that there is no evidence that
the accident and injuries complained of were
caused by any negligent act or omission of the
defendant or its agents; there is no evidence of
any faulty construction that in any way caused or
contributed to the accident complained of; there

is no evidence of any defect in the threshold that in any way caused the accident complained of; there is no evidence that the defect, if it did exist at the time of the accident complained of, was known to the defendant or that it had existed for a sufficient length of time to cause the defendant to have notice of it; that the alleged defect was as obvious to the plaintiff as it was to the defendant and therefore there was no duty upon the defendant to apprise the plaintiff of the condition existing in the doorway; there is no definite evidence as to what caused the accident and that the alleged defects are so slight as not to constitute negligence as a matter of law.

2. The Trial Court erred in refusing to give defendant's requested Instruction No. 4, as requested, upon the ground that the instruction as submitted correctly stated the law.

3. The Trial Court erred in refusing to give defendant's Instruction No. 5, upon the ground that the instruction was proper under the law and the evidence in the case.

4. The Trial Court erred in refusing to give defendant's Instruction No. 9, upon the ground that the evidence shows the threshold was constructed in accordance with the ordinary and customary manner of other and similar thresholds in the locality and that the instruction was proper under the law and the evidence.

This appellant hereby designates to be printed the whole of the record, including the exhibits and

reporter's transcript forwarded to this Court by the Clerk of the United States District Court, except the following portions of said record:

1. Judgment

2. Minute Entries: (a) Order continuing Motion to Strike, June 16, 1947. (b) Hearing on Motion to Strike, June 23, 1947. (c) Order setting for trial, September 8, 1947. (d) Order resetting case for trial, September 12, 1947. (e) Order resetting case for trial, January 14, 1948

3. Order approving bond on appeal, May 28, 1948

4. Verdict

Dated this 1st day of July, 1948.

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
& LINTON

By Harold L. Divelbess,
Attorneys for Appellant.

Received copy of the foregoing this 1st day of July, 1948.

/s/ BROWN & LANGERMAN
/s/ By R. Truxal.

[Endorsed]: Filed July 6, 1948. Paul P. O'Brien,
Clerk.

No. 11,966

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

J. J. NEWBERRY COMPANY, a corporation,
Appellant,

vs.

MERTON L. CRANDALL and ETTA CRANDALL,
his wife,
Appellees.

**Appeal from the United States District Court
for the District of Arizona**

BRIEF OF APPELLEES

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Phoenix, Arizona
Attorneys for Appellees

OCT 14 1948

PAUL P. O'BRIEN,

No. 11,966

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

J. J. NEWBERRY COMPANY, a corporation,
Appellant,

vs.

MERTON L. CRANDALL and ETTA CRANDALL,
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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

J. J. NEWBERRY COMPANY,
a corporation,

Appellant,

vs.

MERTON L. CRANDALL and ETTA
CRANDALL, his wife,

Appellees.

No.
11966

BRIEF OF APPELLEES

The parties herein will be referred to by their designations in the Circuit Court; that is, Defendant as Appellant and Plaintiffs as Appellees. Reference to the Transcript of Record will be indicated by the letter "T" followed by page number.

STATEMENT OF THE CASE

While Appellees do not controvert the statement of the case in Appellant's brief, an amplification thereof might facilitate consideration of the case by the Court.

On February 11, 1946, Appellee, Etta Crandall, entered Appellant's store to purchase tissues. She was a resident of Hudson, Michigan, having been in Phoenix, Arizona, for only three days, and had never before visited Appellant's store (T-41). She entered the store

from the Washington Street entrance (T-41), the doorway of which is on the same level or grade as the sidewalk adjoining the store (T-6, T-10). After being advised that Appellant had no tissues, Mrs. Crandall started to leave the store by the entrance on First Avenue (T-42). Prior to the time that she reached the First Avenue doorway, nothing unusual happened to her, nor did she slip, slide or fall in any way prior to reaching said doorway (T-92). Upon reaching the doorway, her left foot struck an obstruction, causing her to fall through the entrance and to be hurled forward on the sidewalk, breaking her left hip (T-42, T-44). She was taken to St. Monica's Hospital, where she remained under the care of Dr. Matthew Cohen for about eleven weeks (T-46), after which she was taken back to her home, where she remained in bed for another month (T-47).

On April 12, 1947, Appellees filed their complaint in the Superior Court of Maricopa County, Arizona, against the Appellant and subsequently the Appellant had the cause removed to the District Court of the United States in and for the District of Arizona, on the ground of diversity of citizenship.

On April 6, 1948, the case came on for trial before a jury, and at that time Appellee, Etta Crandall, testified in the manner indicated above. She added that at the time of the accident she was walking out of the First Avenue entrance "in a normal manner" (T-46), and that while she did not see the obstruction which her foot struck, she felt it (T-93).

Marie Cooley and Donna Mae Cooley testified that they saw Mrs. Crandall as she was falling and that while they did not know the cause of the fall that at the time they first saw Mrs. Crandall she was coming

through the doorway of the First Avenue entrance of the Newberry Store and was falling (T-33, 34. T-36, 37).

Appellee, Merton L. Crandall, testified that on the same day and immediately after the accident, he examined the First Avenue entrance (T-52); that he had been an engineer for 25 or 30 years, and had during that entire period worked with practically all types of metals (T-50, 51); that the threshold in the First Avenue doorway was made of three metal sections which were anchored there with screws and that there were some pieces chipped out of the threshold (T-52); that he was able to tell from his examination of the chips that they were of an old origin (T-53, 54); that one of the chipped out places in sizes was $1\frac{1}{2}$ inches or $1\frac{3}{4}$ inches and the other $2\frac{3}{8}$ inches (T-59), each of them extending from the inner edge of the threshold back toward the center. These chipped out places were not symmetrical and therefore cannot be properly dimensioned (T-112), but they were "chunks . . . broken right out (T-58);" that the ends of the three metal plates were not flush as they should have been, but instead the corners stuck up and were cocked and did not fit together like one solid piece (T-52, 53); that all of these defects had been caused by an improper assembly of the three pieces of metal which formed the metal threshold and that the uneven fittings of the three pieces had resulted through long usage in the chipping out of the metal corners, resulting in the holes in question (T-59, 60); that the metal threshold of the First Avenue entrance looked about the same on the day of the trial as it had on the day of the accident (T-56); "the general look—the general picture of the thing is the same as it was at that time." (T-91)

In the light of this testimony and by stipulation of counsel, the jury were, during the course of the trial, given a view of the threshold involved in the accident (T-113).

Mr. Charles C. Huffman, Manager of the Newberry Store, testified that the construction of the First Avenue entrance of the store was the same on February 11, 1946, as it had been since 1938, without any changes or alterations having been made (T-39).

Dr. Matthew Cohen testified that Mrs. Crandall suffered a broken hip and had about 33 $\frac{1}{3}$ % permanent total disability of her left lower extremity, as well as an inch of shortening in the said extremity.

After Appellees rested, Appellant's motion for directed verdict was denied and Appellant then offered evidence regarding the time when the chips in the doorway first appeared. Appellant's witnesses testified that the chips in the threshold were not there on the day of the accident (T-101, 106, 113, 116), and that they were first noticed by Appellant's manager around July, 1947 (T-101). Exhibit "B" in evidence, prepared by Appellant's witness Joe Scott, shows the dimension of the metal threshold and locates the three chips therein, and Appellant's approximation of the size of same, as of January, 1948 (T-112). Appellant further offered evidence that at all times during store hours there are within a radius of 20 feet from the First Avenue entrance nine 300-watt lights burning (T-116, 117).

Appellant having completed its case, Appellees then put on the rebuttal testimony of Mrs. Elvira Magnusson, who testified that on March 20, 1946, she examined the First Avenue entrance to the Newberry Store (T-121); that immediately thereafter she made some notes

covering this examination, and that she had just recently looked at these notes to refresh her memory (T-122); that in the course of her examination she noticed two holes on the inner ledge of the First Avenue entrance, and irregularities and a raised part where the ridges were joined together (T-122).

After Appellant's renewed motion for directed verdict was denied (T-120), the matter was argued to the jury. The Court then instructed the jury as to the law. The jury then retired and after consideration returned its verdict in favor of the Appellees.

ARGUMENT

In support of their contention that the verdict and judgment of the District Court be affirmed, Appellees submit as their first proposition of law that:

IN DETERMINING WHETHER THE ACTION OF A TRIAL COURT, IN DENYING A MOTION FOR A DIRECTED VERDICT, IS ERROR, THE REVIEWING COURT WILL GIVE THE EVIDENCE THE MOST FAVORABLE CONSTRUCTION AND CONSIDER IT IN THE MOST FAVORABLE ASPECT TO THE APPELLEES, OF WHICH IT IS REASONABLY SUSCEPTIBLE AND WILL ASSUME AS ESTABLISHED ALL THE FACTS THAT THE EVIDENCE SUPPORTING THE APPELLEES' CLAIMS REASONABLY TENDS TO PROVE AND WILL DRAW IN FAVOR OF THE APPELLEES ALL THE INFERENCES FAIRLY DEDUCIBLE FROM SUCH FACTS.

The second proposition of law which Appellees will urge is that:

A STOREKEEPER HAS THE DUTY TOWARD ANY BUSINESS VISITOR TO ASCERTAIN THE ACTUAL CONDITION OF THE PREMISES AND, HAVING DISCOVERED ANY DEFECTS, EITHER TO CORRECT THEM BY REPAIR OR TO GIVE WARNING OF THE CONDITION AND THE RISK INVOLVED; AND A BUSINESS VISITOR, BEING ENTITLED TO EXPECT THIS CONDUCT ON THE PART OF A STOREKEEPER, IS NOT REQUIRED TO BE ON THE ALERT TO DISCOVER DEFECTS.

In connection with this proposition of law, Appellees will discuss Appellant's proposition of law No. 2 (Appellant's brief PP. 19-23).

Our third proposition of law is that:

THE QUESTION OF WHETHER A DEFECT, NO MATTER HOW SLIGHT, CONSTITUTES NEGLIGENCE, SHOULD BE SUBMITTED TO THE JURY IN ALL CASES IN WHICH IT APPEARS THAT REASONABLE MEN MIGHT ARRIVE AT DIFFERENT CONCLUSIONS.

This proposition will be argued in connection with Appellees' discussion of Appellant's proposition of law No. 3 (Appellant's Brief PP. 23-26).

In connection with Appellant's proposition of law No. 1, (Appellant's brief PP. 11-19) Appellees submit that this proposition has no application to the facts of this case, and that the sole question in regard to the element of causation is whether circumstantial evidence of causation is sufficient to take this question to the jury, and on this point Appellees submit as their fourth and last proposition of law what they believe to be the correct and applicable rule that:

CIRCUMSTANTIAL EVIDENCE FROM WHICH A REASONABLE INFERENCE MAY BE DRAWN THAT APPELLANT'S NEGLIGENCE WAS THE CAUSE OF APPELLEE'S INJURIES IS SUFFICIENT TO TAKE THIS QUESTION TO THE JURY AND TO FORM THE BASIS FOR A JUDGMENT IN FAVOR OF THE APPELLEES.

PROPOSITION OF LAW NO. 1

IN DETERMINING WHETHER THE ACTION OF A TRIAL COURT, IN DENYING A MOTION FOR A DIRECTED VERDICT, IS ERROR, THE REVIEWING COURT WILL GIVE THE EVIDENCE THE MOST FAVORABLE CONSTRUCTION AND CONSIDER IT IN THE MOST FAVORABLE ASPECT TO THE APPELLEES, OF WHICH IT IS REASONABLY SUSCEPTIBLE AND WILL ASSUME AS ESTABLISHED ALL THE FACTS THAT THE EVIDENCE SUPPORTING THE APPELLEES' CLAIMS REASONABLY TENDS TO PROVE AND WILL DRAW IN FAVOR OF THE APPELLEES ALL THE INFERENCES FAIRLY DEDUCIBLE FROM SUCH FACTS.

Vol. 3 American Jurisprudence
Sec. 944, 945

Kroeger et ux. v. Union Indemnity Co. (Ariz.)
14 Pac. 2d. 258, 259,
40 Ariz. 467

Gunning v. Cooley,
50 Supreme Court 231, 233
281 U. S. 90

Arizona Binghampton Copper Co. v. Dickson
(Ariz.)
195 Pac. 538, 540, 542

Section 944, Volume 3, American Jurisprudence, on the subject "Appeal and Error" provides:

"Taking Case from Jury—In General.—Generally, it may be said that a court must, in reviewing a ruling on a motion for a nonsuit, a demurrer to the evidence, or a motion to direct a verdict, view the evidence from a standpoint most favorable to the party objecting to the granting of such motion. * * *"

and Section 945 provides in part:

"Order Granting Motion. —" * * * Thus, in passing upon the question whether a verdict should have been directed for the defendant, the reviewing court will assume as established all the facts that the evidence supporting the plaintiff's claims reasonably tends to prove, and that there should be drawn in his favor all the inferences fairly deducible from such facts; it cannot base its judgment on the defendant's evidence, or draw inferences favorable to him."

The rule set forth in the aforementioned text has been generally followed by the courts of this country. The Arizona Supreme Court has applied this rule many times where the trial court has granted a motion to direct the verdict and has repeatedly stated that in determining whether the Court should have directed a verdict for the defendant, the Appellate Court must construe the evidence most favorably for the plaintiff. *Kroeger et ux. v. Union Indemnity Co.*, supra.

In *Arizona Binghampton Copper Co. v. Dickson*, supra, (discussed in detail in connection with Appellees' Proposition of Law No. 4), the Arizona Supreme Court in deciding that the trial court had properly denied defendant's motion for directed verdict pointed out that:

“* * * A motion of this kind is regarded as admitting the truth of whatever competent evidence the opposing party had introduced, and challenging its sufficiency to support a verdict. If, therefore, the plaintiff’s evidence and the reasonable inference therefrom, considered, as they must be on this motion, in the strongest light against the defendant, were sufficient to support a verdict, the motion was properly overruled. * * *”

This same rule has been applied by the United States Supreme Court in a number of cases. In *Gunning v. Cooley*, supra, the Court unanimously affirmed the decision of the Circuit Court and of the Trial Court denying defendant’s motion for a directed verdict. In that case the Supreme Court stated the federal rule to be as follows:

“In determining a motion of either party for a peremptory instruction, the Court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them.”

PROPOSITION OF LAW NO. 2

A STOREKEEPER HAS THE DUTY TOWARD ANY BUSINESS VISITOR TO ASCERTAIN THE ACTUAL CONDITION OF THE PREMISES AND, HAVING DISCOVERED ANY DEFECTS, EITHER TO CORRECT THEM BY REPAIR OR TO GIVE WARNING OF THE CONDITION AND THE RISK INVOLVED; AND A BUSINESS VISITOR, BEING ENTITLED TO EXPECT THIS CONDUCT ON THE PART OF A STOREKEEPER, IS NOT REQUIRED TO BE ON THE ALERT TO DISCOVER DEFECTS.

Volume 2, Restatement Law of Torts,
Sec. 343

Smith v. Normart (Ariz.)

75 Pac. 2d 38, 42

114 A.L.R. 1456

Cole et al. v. Arizona Edison Co., Inc. (Ariz.)

53 Ariz. 141

86 Pac. 2d 946, 947

Avery v. S. Kann Sons Co.

81 Fed. 2d 261, 262

Anderson v. Sears Roebuck & Co. (Minn.)

26 N. W. 2d 355

Lane Drug Stores, Inc. v. Story (Ga.)

35 S. E. 2d 472

Brunet v. S. S. Kresge Co. (C.C.A. 7th)

115 Fed. 2d 713

Houston Nat. Bank v. Adair (Tex.)

207 S. W. 2d 374

Rogers v. Max Azen, Inc. (Pa.)

16 Atlantic 2d 529

Volume 2, Restatement Law of Torts, Section 343,
provides:

*“Section 343. Dangerous Conditions Known to
or Discoverable by Possessor.*

* * *

Comment:

“d. What business visitor entitled to expect.
A business visitor is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein. Therefore, a business visitor is not required to be on the alert to dis-

cover defects which, if he were a bare licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to discover a defect, as well as in determining whether the defect is one of which the possessor should believe that his visitor would not discover and as to which, therefore, he must use reasonable care to warn the visitor.

“e. *Preparation required for business visitor.* In determining the extent of preparation which a business visitor is entitled to expect to be made for his protection, the nature of the land and the purposes for which it is used are of great importance. One who enters a private residence even for purposes connected with the owner’s business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors. On the other hand, one entering a store, theatre, office building or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors. * * *”

As was pointed out by Appellant in its brief (P. 21), the Arizona Supreme Court has announced the rule that it would follow the Restatement of Law where the Court was not bound by previous decision or by legislative enactment. *Smith v. Normart* (Ariz.) supra; *Cole et al. v. Arizona Edison Co., Inc.* (Ariz.), supra.

Appellant’s brief (P. 19) sets forth as Appellant’s Proposition of Law No. 2 that “A storekeeper is not liable for a customer’s injuries where the dangerous condition alleged to have caused the injuries is as obvious to the customers as to the owner.”

Appellees contend that such a rule of law would place a duty upon a business visitor of a storekeeper who has no knowledge of any defect or dangerous condition, nor any warning thereof, to be on the alert for such conditions. Such a rule would place upon business visitors a greater degree of care than that set forth in the Restatement. Appellees have found no cases which support the rule as set forth in Appellant's brief. Furthermore, if there were any such rule of law, it would have no application to the facts of the present case. While it is true that in the present case the chips in the doorway were not hidden, it does not follow that they thereby became as obvious to the Appellee, Mrs. Crandall, as they were to the storekeeper. Mrs. Crandall had never before visited the store (T-41) and, as shown by the pleadings (T-5, 6; T-10), on the occasion of her first visit, which resulted in her injury, she had entered the store by a different entrance, one in which the doorway was on the same level or grade as the sidewalk adjoining the store. The fact that Mrs. Crandall might have been able, had she been looking for a dangerous condition, and had she made an examination of the doorway, to have seen the chips, does not at all make these defects as obvious to her as they were to the storekeeper.

In *Avery v. S. Kann Sons Co.*, supra, plaintiff who fell over a crack in the linoleum on the top step of a flight of stairs testified "There was no difficulty in seeing the steps at the time of her fall." Nevertheless, plaintiff was permitted to recover and the verdict in her favor was affirmed.

In the present case, the chips were of an old origin (T-53) and the storekeeper who had a duty to ascertain that they were there, had had ample opportunity to

learn of this condition. It can hardly be argued that Mrs. Crandall had a similar or comparable opportunity as the storekeeper.

The cases cited by Appellant in support of its proposition of Law No. 2 (Appellant's brief PP. 20-23) involve plaintiffs who had either actual knowledge of the defect which allegedly caused the injury or had reason because of the circumstances to be on the alert for the defect or had visited the scene of the accident frequently prior to being injured and had had an opportunity to learn of the defect comparable to that of the defendant.

In *Anderson v. Sears, Roebuck & Co.*, supra, (Appellant's brief P. 22), plaintiff had ascended the defective step a short time before he fell over it on his return. Plaintiff had actual knowledge that the stair, which constituted a change in the floor level, (the alleged negligence of defendant) was there. These facts distinguish this case completely from the instant case.

In *Lane Drug Stores, Inc. v. Story*, supra (Appellant's brief PP 20, 22), plaintiff admitted having seen the stool over which she subsequently fell. In addition, the stool which was standing in the aisle was a fairly large object, being 12 inches high, 12 inches long, and 18 inches wide.

In *Brunet v. S. S. Kresge Co.*, supra, (Appellant's brief P. 20) plaintiff slipped and fell while descending some steps which were wet and muddy. In this case, as in the *Anderson* case, supra, plaintiff had ascended the steps only a few minutes before her fall and had actual knowledge that the stairs were wet and slippery. Not only did the plaintiff in the *Brunet* case have actual knowledge, but in view of the fact that it was a snowy

day and the steps were near the doorway, plaintiff had reason to expect the steps to be wet and slippery, and to be on the alert.

In *Houston Nat. Bank v. Adair*, supra, (Appellant's brief PP 21-22), not only was there no evidence as to how the stairs became slick, or that defendant's negligence caused it (this being the real basis of the decision), but in any event the plaintiff who had used the stairs a number of times over a period of several years, should have known of it. This case too differs from the present case in which Appellee, Mrs. Crandall, had never before been in the store and had never before used the exit in question.

In *Rogers v. Max Azen, Inc.*, supra, (Appellant's brief P. 20), plaintiff testified that she wasn't looking and that that was why she had not seen the protruding part over which she fell.

None of these cases places an obligation on a business visitor of a storekeeper to be on the alert for defects which he has no reason to expect. Nor do they set forth a rule of law that a business visitor can recover only if he injures himself on latent or hidden defects. At most, they stand for the proposition that a plaintiff who has actual knowledge of a dangerous condition or who has reason, because of his previous familiarity with that condition or because of the nature of the condition, to expect a dangerous condition, cannot recover when he is injured by that dangerous condition.

PROPOSITION OF LAW NO. 3

THE QUESTION OF WHETHER A DEFECT, NO MATTER HOW SLIGHT, CONSTITUTES NEGLIGENCE, SHOULD BE SUBMITTED TO THE JURY IN ALL CASES IN WHICH IT AP-

PEARS THAT REASONABLE MEN MIGHT ARRIVE AT DIFFERENT CONCLUSIONS.

Dillow v. City of Yuma,

55 Ariz. 6

97 Pac. 2d 535, 536, 537

Cobb et al. v. Salt River Valley Water Users' Assn. (Ariz.)

114 Pac. 2d 904, 906

Jennings v. Tompkins (Mass.)

62 N. E. 265

Johnson v. Fainstein (Mass.)

107 N. E. 351

Loudon v. Beaulieu et al. (Mass.)

177 N. E. 806

Solomon v. Boston Elevated Ry. Co. (Mass.)

176 N. E. 810

Bohannon v. Leonard-Fitzpatrick-Mueller Stores Co., Inc. (N.C.)

150 S.E. 356

Stark et al v. Franklin Simon & Co.,

260 N.Y.S. 691

Lewis-Kures et al. v. Edward R. Walsh & Co., Inc., (C.C.A. 2)

102 Fed. 2d 42

The Arizona Supreme Court, in the case of *Dillow v. City of Yuma*, supra (cited on Page 25 of Appellant's brief) sets forth the Arizona rule on this point, which is, according to the Arizona Court, in accord with the great weight of authority. After pointing out that there is a wide disagreement among the Courts as to when a defect may or may not be declared, as a matter of law, harmless, the Court quoted with approval the rule laid down in *Shugren v. Salt Lake City*, 48 Utah 320, 159 P. 530, 533:

“It seems to us that in case it is made to appear that reasonable men might arrive at different conclusions with regard to whether the maintenance of a particular defect in a sidewalk or street constituted negligence on the part of the municipality, the question should be submitted to the jury. That method is certainly quite as safe, and much more logical than to have courts as matter of law declare that the maintenance of a projection 2½ inches in height is not an actionable defect, while one of 3 inches or more is. Of course, there may be defects so slight and unimportant, or by reason of their location may be so unimportant, that a court might well say as matter of law that the maintenance thereof did not constitute negligence on the part of the municipality. Under such circumstances, however, reasonable men may not differ. However unsatisfactory the foregoing test may be, yet it is the only practical, and, all things considered, the fairest test that courts have been able to evolve.”

The Court then went on to say that:

“We believe the above to be a fair statement of the rule in most jurisdictions at the present time,” and then added that

“We do not list the numerous cases that have passed upon the question, but we have no doubt that the great weight of authority coincides with the view we have expressed.”

The Court, after stating the above to be the correct rule, went ahead to find in the case in question that since reasonable men might have concluded that the defect was dangerous, the Trial Court had acted improperly in directing the verdict for defendant.

The rule laid down in *Dillow v. City of Yuma* has been applied by the Arizona Supreme Court in subsequent cases where the defendant was some one other

than the city. In the case of *Cobb et al. v. Salt River Valley Water Users' Assn.*, supra, the Court quoted approvingly from *Dillow v. City of Yuma*, and reversed the Trial Court's directed verdict for the defendant, pointing out that since reasonable men might have differed in the case, the question of whether the maintenance of the particular defect was negligence, should have been submitted to the jury.

In the instant case, the evidence showed that there were two chipped out places on the inner part of the metal threshold, one of them being about $2\frac{3}{8}$ inches and the other about $1\frac{1}{2}$ inches in size. Certainly under these facts reasonable men could have concluded that the defects constituted negligence and that Appellant had the duty to repair the defects or give warning of them.

Appellant states in its brief (Page 23), as its third Proposition of Law, that "Slight and inconsequential defects do not constitute negligence." It is true that in a few jurisdictions, the courts have undertaken to fix the dividing line to the fraction of an inch between defects which are negligence and those which are not. One of these jurisdictions is the State of Massachusetts, where the Court held that a projection by a nail or nails of $\frac{3}{16}$ ths of an inch is not negligence. *Jennings v. Tompkins*, and *Johnson v. Fainstein*, supra (cited in Appellant's brief PP 24-25). The same Court, a number of years later, held in the case of *Loudon v. Beaulieu et al.*, supra, that where the plaintiff fell on a stairway by catching her heel, and where the only defects shown were a sticking up of the brass nosing " $\frac{1}{2}$ inch or a little better" and the sticking up of a screw "less than $\frac{1}{2}$ inch," enough of a defect existed to present a question of fact for the jury. The Court said:

“The cases of *Jennings vs. Tomkins*, 180 Mass. 302, 62 N. E. 265, and *Johnson v. Fainstein*, 219 Mass. 537, 107 N. E. 351, cited by the defendants are distinguishable in their facts from the case at bar.”

In the case of *Solomon v. Boston Elevated Ry. Co.*, supra, the Massachusetts Court found that the projecting of a broken metal safety tread which had broken away from its main part and extended outward from the edge of the step over which plaintiff fell was a sufficient defect to submit to a jury, even though the extension was only $\frac{3}{4}$ ths of an inch. Apparently the rule in Massachusetts is that a defect of $\frac{3}{16}$ ths of an inch is not negligence, whereas one of approximately $\frac{1}{2}$ of an inch or $\frac{3}{4}$ ths of an inch is. Even if this were the law in Arizona, the judgment in the present case should still be affirmed, because the defect here was greater than $\frac{3}{16}$ ths of an inch.

The other cases cited by Appellant in support of its Proposition of Law No. 3 (Appellant's brief PP 24-25) also illustrate the split of authority on this question. It should be pointed out, however, that each of the cases cited by Appellant involved a defect considerably smaller than the one in the present case.

In *Bohannon v. Leonard-Fitzpatrick-Mueller Stores Co., Inc.*, supra (Appellant's brief P. 26), the alleged defect consisted of a metal strip $\frac{1}{16}$ th of an inch higher than the surface of the step.

In *Stark et al. v. Franklin Simon & Co.*, supra, the alleged defect consisted of $\frac{1}{2}$ inch spaces between metal strips placed on the linoleum covering the steps.

And in *Lewis-Kures et al. v. Edward R. Walsh & Co., Inc.*, supra, (Appellant's brief P. 24), not only was the crack in the step smaller than the defects in the

present case, but the actual decision reversing the judgment for the plaintiff and directing a verdict in favor of the defendant, was not based on the size of the defects, but on the fact that there was no evidence that the defendant had actual or constructive knowledge either of the cracks or of the litter and debris which were on the step, and on the further fact that plaintiff had actual knowledge of the presence of the litter and debris over which she fell.

Appellees respectfully submit that the rule laid down in the case of *Dillow v. City of Yuma*, supra, which is the Arizona rule, is supported by the better and greater weight of authority, and that under this rule the question of whether defects of the size involved here were negligence was for the jury.

PROPOSITION OF LAW NO. 4

CIRCUMSTANTIAL EVIDENCE FROM WHICH A REASONABLE INFERENCE MAY BE DRAWN THAT APPELLANT'S NEGLIGENCE WAS THE CAUSE OF APPELLEE'S INJURIES IS SUFFICIENT TO TAKE THIS QUESTION TO THE JURY AND TO FORM THE BASIS FOR A JUDGMENT IN FAVOR OF THE APPELLEES.

Volume 38, American Jurisprudence, Negligence
Sec. 334

Town of Flagstaff et al. v. Gomez (Ariz.)
202 Pac. 401, 405

Arizona Binghampton Copper Co. v. Dickson
(Ariz.)
195 Pac. 538, 540, 542

Inspiration Consol. Copper Co. v. Conwell (Ariz.)
190 Pac. 88, 90

Gunning v. Cooley,
50 Supreme Court 231, 234
281 U. S. 90

Owl Drug Co. v. Crandall et al. (Ariz.)
52 Ariz. 322,
80 Pac. 2d 952, 955

Selby v. S. Kann Sons Co.,
73 Fed. 2d 853

Sellew v. Tuttle's Millinery, Inc. (Mass.)
66 N. E. 2d 26, 28

Simpson v. Hillman et al. (Ore.)
97 Pac. 2d 527, 530

Shephard v. Great Atlantic & Pacific Tea Co.,
(Ky.)
205 S. W. 2d 687, 688

Weber v. Valier & Spies Milling Co. (Mo.)
242 S. W. 985

Relahan v. F. W. Woolworth Co. (Kan.)
67 Pac. 2d 538, 540

Volume 38, American Jurisprudence. Negligence.
Section 334, on the subject "Proximate Cause" provides:

"In accord with the rule governing proof of negligence generally, proximate cause need not be established by the testimony of eyewitnesses, nor by direct or positive evidence, but may be proved by circumstantial evidence; it may be determined from the circumstances of the case."

This rule, which is generally accepted by the courts of this country, has been followed by the Arizona Supreme Court in a number of cases.

In *Town of Flagstaff et al. v. Gomez*, supra, the plaintiff brought an action as the father of his fifteen months old child who had died as a result of drowning by

falling in an open sewer manhole. The plaintiff alleged negligence on the part of the defendant in leaving the manhole unguarded. There was no evidence of any sort showing how the child had fallen into the manhole, as no one had seen the accident. There was evidence that 10 or 12 minutes before the child's body was discovered, it had been seen in the street about halfway between the gate of its yard and the open manhole, and that after the child's body was taken from the manhole, water ran from its mouth and nose.

Even though there was no direct evidence of how the accident had occurred, nor was there any direct evidence establishing that the failure to guard the excavation was the proximate cause thereof, nevertheless, the Court held that the trial court had acted properly in denying defendant's motion for directed verdict. The Court said there was sufficient evidence of proximate cause to take this matter to the jury, pointing out that

“No one, it is true, saw it fall in, but the fact that it was seen in the street near the manhole alone almost immediately before that and found a very few minutes afterwards, with nothing to suggest, even remotely, that a passing vehicle might have knocked it in accidentally or some other child pushed it in while playing, in connection with the other evidence in the case, leads to the conclusion that the child, too small to appreciate danger, while walking along or across the street, fell in the water because of the unprotected excavation. And, since ‘that cause is proximate without which the accident would not have happened’ (Inspiration Consolidated Copper Co. v. Conwell, 21 Ariz. 480, 190 Pac. 88), the facts justified submitting to the jury the question whether the negligent omission to protect the excavation was the proximate cause of the child's death, for ‘proximate cause is a question of fact for the jury and may be inferred from cir-

cumstantial evidence if it is substantial.' *Arizona Binghamton Copper Co. v. Dickson*, 22 Ariz. —, 194 Pac. 538."

In *Arizona Binghamton Copper Co. v. Dickson*, supra, defendant had furnished a ladder which was being used by plaintiff's intestate on the date of the accident. Plaintiff's intestate and another man named Chapman were heard to fall and were then found unconscious at the bottom of this ladder. Neither one lived to tell how the accident happened, nor were there any witnesses. The ladder was about 130 feet high, and after the accident four rungs of the ladder about 50 feet up were discovered to be broken in two in the middle, and the one immediately above was pulled loose from the side of the ladder at one end, the nails being pulled out with the rung. Defendant argued that assuming the defects were due to the negligence of the defendant, there was no proof that these defects were the proximate cause of the accident and that to so find it would be necessary to indulge in "presumptions resting on the base of another presumption."

The Court, in affirming the decision of the Trial Court in denying the motion of the defendant for a directed verdict, said:

"From these proven facts the jury must inevitably have inferred or concluded that deceased had progressed in his ascent until his weight rested upon the rung that pulled out of the wet and rotten upright, and when that occurred, in an effort to prevent falling, the deceased successively grasped the four rungs beneath, only to have them, under the impact of his weight, break asunder, and in the meantime, the momentum of his body eluding all further efforts, he yielded to the inevitable and fell to his death. Such a conclusion would be an immediate and rational inference from the facts and

circumstances proved. We have recently decided that the proximate cause is a question of fact for the jury and may be inferred from circumstantial evidence if it is substantial. *Inspiration Cons. Copper Co. v. Conwell*, 190 Pac. 88. See, also, *Valiotis v. Utah-Apex Mine Co.* (Utah) 184 Pac. 802.

“The law is not so exacting as to require every fact and circumstance going to make up a case of negligence, or to identify the proximate cause, to be proved by eye-witnesses or positive, direct testimony.”

It should be pointed out that in the case above cited, there was no evidence to show that plaintiff's fall had not been caused in another way. For example, the plaintiff might conceivably have climbed higher on the ladder and fallen at a point where there was no flaw in the ladder and have broken the rungs of the ladder on the way down. The fact that this might possibly have happened did not cause the Court to direct a verdict for the defendant or to take the question of proximate cause from the jury.

In *Inspiration Consol. Copper Co. v. Conwell*, *supra*, plaintiff sought damages for the death of his intestate, Lawrence Conwell, alleged to have been caused by defendant's negligence. Conwell was a motorman in the service of the defendant. On the day of the accident, there was a derailment of two of the loaded cars attached to the motor Conwell was driving. The two cars derailed were immediately behind the motor. As a result of the derailment, the motor was violently jolted and jarred. After the accident, Conwell was found behind the motorman's seat between the motor and the first car, his body crushed. No one saw how the death of Conwell occurred. Plaintiff argued that the derailment was caused by defendant's negligence and that

Conwell had been unseated by the jolting of the car and had fallen between the car and the motor and was thus crushed. Defendant argued that Conwell might have been standing up and accidentally overbalanced, or he might have been seated and become pinned between the car and the motor while reaching from his seat to rescue a chain that might have dropped off the pan on the motor. There was no direct testimony to substantiate either of these theories. Despite the argument that "in the absence of direct evidence it was a mere guess or speculation as to how Conwell came to his death," the Court affirmed the ruling of the Trial Court in denying defendant's motion for a directed verdict. The Court said:

"Conceding, as we do, that it was not for the jury to guess or speculate as to the cause of the accident, we think it is far more reasonable to suppose, and the jury, in our opinion, might well have inferred, that the jolt of the derailment caused Conwell to lose his seat and fall between the car and the motor, or between the safety post and the car, and that he was thus crushed and killed.
* * * In our opinion, the evidence was sufficient to send the case to the jury upon this point, and we think that the jury was warranted in finding, as they must necessarily have done, that Conwell was killed by the derailment of the cars without any intervening cause such as suggested by the defendant."

The Court then added that:

"* * * Proximate cause is a question of fact, and a question for the jury if there is substantial evidence from which it may reasonably be deduced that the negligence shown was the proximate cause of the injury complained of. In short, proximate cause may be determined from circumstantial evidence. * * *"

The rule that proximate cause may be established by circumstantial evidence has been followed by the United States Supreme Court. In *Gunning v. Cooley*, supra, the Court held that the question of proximate cause was properly left to the jury and that the defendant's motion for a directed verdict had been properly denied, even though there was no direct evidence that the defendant's alleged negligence had caused the injury complained of. In that case, although plaintiff had alleged and testified that defendant, a doctor, had negligently treated her by placing acid in her ears, there was no testimony of any sort showing that this alleged negligence had caused the perforations of the ear drum or the permanent deafness which were the alleged injuries. On the question of proximate cause, the Court stated:

"It was not necessary for the trial court, in passing upon the motion *(defendant's motion for directed verdict) to determine, and we need not consider, whether under the rules laid down in the decision of this court the evidence was sufficient to warrant a finding that the perforations of either eardrum or permanent deafness resulted from defendant's treatment."

* Words in parentheses added.

The Court said it was sufficient to take the question of negligence to the jury that plaintiff had testified regarding the treatment she had received from the defendant and how this treatment affected her; and the fact that she stated the treatment made her dizzy and created noises in her ears was enough to permit the jury to infer that her subsequent condition, of which she was complaining, namely, the perforation of her ear drum and the permanent deafness, was proximately

caused by the said treatment even though there was no direct testimony to that effect.

Appellant has set forth as its First Proposition of Law that "Where evidence shows that plaintiff's injuries may have resulted from one of several causes, and that only one of causes can be attributed to defendant's negligence, plaintiff cannot recover."

If, by this Proposition of Law, Appellant contends that it is not proper to submit the question of proximate cause to the jury in a case where there is no direct evidence of proximate cause, but in which there is evidence from which proximate cause may reasonably be inferred, then Appellant's Proposition of Law is not a correct one; and if Appellant does not intend that such a conclusion be drawn from its Proposition of Law, then this proposition has no application to the present case. In the present case, there was no evidence of several possible causes of the injury. There was evidence of only one possible cause, that being the defects in the threshold over which Appellee, Mrs. Crandall, fell. The other so-called possible causes exist only in the imagination of Appellant, and not in the evidence.

None of the cases cited by the Appellant in support of its proposition (Appellant's brief PP 12, 13, 14) is in point with the facts of the present case.

In *Owl Drug Co. v. Crandall et al.*, supra, (Appellant's brief P. 12) plaintiff stumbled and fell while getting down from a stool at defendant's lunch counter. Subsequently, and while defendant's employees were endeavoring to assist her to arise, she fell again. There was no claim that defendant was responsible for the first fall, nor was there any evidence that the second fall was caused by defendant's negligence, as claimed

by the plaintiff. The Court, after pointing out that there was no evidence that the second fall was due to defendant's failure to use reasonable care and that all of the available evidence indicated that defendant's employees had done the best they could, concluded by saying that:

“We are satisfied that the plaintiffs have failed to make out a case of negligence and for that reason the judgment is reversed.”

In its dicta, the Court did point out that even if it had been established that defendant was guilty of negligence in connection with plaintiff's second fall, that there was no way of establishing which of the falls had caused the injury, although the Court does intimate that it was more reasonable to conclude that the fractured femur resulted from the first fall rather than the second one. In the absence of any direct evidence or any circumstantial evidence from which it could reasonably be inferred that the second fall, rather than the first one, caused the injuries, plaintiff could not recover.

In the case of *Selby v. S. Kann Sons Co.*, supra (discussed on Page 13 of Appellant's brief), the actual basis for the Court's decision was the fact that there was no evidence of any sort to show that the alleged defect had existed long enough for defendant to have constructive notice thereof, nor was there any evidence to show that defendant had actual notice of the alleged defect. In the absence of such evidence, there was no basis for finding that the defendant was guilty of any negligence.

In the case of *Sellew v. Tuttle's Millinery, Inc.*, supra (Appellant's brief P. 13), plaintiff slipped and fell down the stairs in defendant's store. There was evi-

dence that the step on which she fell was dirty and that it had "an accumulation of dirty little papers." The basis for the decision affirming the directed verdict for the defendants is that there was no evidence at all of any negligence on the part of the defendant. The fact that the stairs were dirty did not warrant a finding that the steps were slippery or dangerous or that defendant was negligent. The Court in its dicta did go on to state that there was no evidence of any causal connection between the dirty condition of the stairs and the fall of the plaintiff.

In *Simpson v. Hillman, et al.*, supra (Appellant's brief PP. 13, 14), again the true basis of the decision was the complete lack of any evidence to show that the defendant was guilty of any negligence, and not the lack of evidence of the question of proximate cause. In that case, a 3½ year old girl was injured as the result of an automobile accident. There was no evidence at all to show how the accident had occurred. No one saw the accident; nor did anyone know whether the girl had been hit by the car or whether she had run into the side of the car. The driver of the car could shed no light on the matter; he had no knowledge of having hit the girl, and his first knowledge of the accident came when he felt a bump on the right side of the car, "kind of like the car had run over some object." The only available evidence indicated that the car was being driven at a reasonable speed; nor was there any evidence to show that the driver failed to use ordinary care to keep a lookout for pedestrians. After discussing the complete lack of any evidence of negligence on the part of the defendant, the Court concludes by saying:

"After careful consideration of the record, we have reached the conclusion that there was no sub-

stantial evidence tending to show that the defendants were negligent in one or more particulars as charged in the complaint.”

In *Shephard v. Great Atlantic & Pacific Tea Co.*, supra (Appellant’s brief Page 12), there was also no evidence of any negligence by defendant. Plaintiff had slipped on a banana peel in an alley behind defendant’s store. Whoever had dropped or placed it there was guilty of negligence, but there was no evidence to identify the guilty party.

Weber v. Valier & Spies Milling Co., supra (Appellant’s brief Page 12) is an action for damages for the death of plaintiff’s father, an employee of defendant. The alleged negligence was in the failure of defendant to guard the opening of a man-hoist, which defendant had provided, between the second and third floors. There were no witnesses to the accident. Deceased’s body was found on the second floor near the opening of the hoist, and near the bottom of the stairway leading from the second to the third floor. There was no way to ascertain from the position of his body or from the nature of the injury which caused his death, whether he had fallen down the unguarded hoist or down the stairway. The evidence indicated and the Court found that either alternative was equally likely. It was not alleged that there was any negligence in connection with the construction or maintenance of the stairway. Furthermore, deceased’s injury showed that he had fallen on his head, which would not have happened if deceased fell through the unguarded opening, unless in the process of falling he caught his foot in the hoist, thus causing him to turn upside down and land on his head. There was a third possible explanation of the accident. Deceased could have gotten on the hoist to

use it in a normal manner and have fallen off. There was no claim that the hoist was not properly constructed and maintained for use in the manner for which it was intended.

In *Relahan v. F. W. Woolworth Co.*, supra (Appellant's brief Page 12), plaintiff fell down stairway in defendant's store. She said she slipped on some paper which appeared to be similar to the wrapping on Hershey Chocolate Bars, and further testimony was offered to show that defendant sold such chocolate bars at a counter on the floor above the steps where plaintiff fell. On this state of facts, the Court held that there was not sufficient evidence of any negligence by defendant because there was no evidence to show that the papers had been on the steps long enough for defendant to have had notice of them, nor was it shown that the paper on the steps was slick or dangerous to persons coming in contact with it.

It is obvious that none of the cases discussed above, and cited by Appellant, is authority for taking from the jury the question of proximate cause in the instant case. Here there is clear and direct evidence of negligence by defendant, and the facts and circumstances of the case are such that reasonable men could infer that it was this negligence which caused injury to Appellee, Etta Crandall. Appellant has failed to cite any case applicable to the facts in the instant case which would justify taking the case from a jury. In the case at bar, the evidence shows only one probable cause of the injury complained of, and that is the defective threshold. There is sufficient evidence from which the jury could reasonably have found, as they necessarily must have done, that Appellee, Mrs. Crandall, caught a part of her foot in one of the chipped out places in the threshold,

and was injured as a result thereof. The accident is clearly shown to have occurred on that threshold. There is no evidence at all of any foreign substance which might have caused it, or of any pushing, shoving or tripping by any person, nor is there any evidence at all to support the other theories of possible causation offered by the Appellant.

Appellees consider it very significant that the jury which had a view of the threshold rejected Appellant's argument that perhaps some other portion of the threshold might have caused Mrs. Crandall's fall, thus rejecting each of the very improbable guesses Appellant made.

Respectfully submitted,

BROWN & LANGERMAN

By: Samuel Langerman

Attorneys for Appellees

TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

—

EDWARD J. McBRIDE, doing business as Con-
tinental Press Service,
Petitioner,
vs.

THE WESTERN UNION TELEGRAPH COM-
PANY, a corporation,
Respondent.

—

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11969

United States
Circuit Court of Appeals
for the Ninth Circuit

EDWARD J. McBRIDE, doing business as Continental Press Service,

Appellant,

vs.

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Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

CHARLES H. CARR,

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417 S. Hill St.,

Los Angeles 13, Calif.

For Appellee:

LAWLER, FELIX & HALL,

Oscar Lawler,

800 Standard Oil Bldg.,

Los Angeles 15, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and
for the Southern District of California, Central
Division

No. 8158—O'C

EDWARD J. McBRIDE, doing business
as CONTINENTAL PRESS SERVICE,
Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH
COMPANY, a corporation,
Defendant.

COMPLAINT

Comes now the Plaintiff and complains of the
Defendant, and for first cause of action alleges:

I.

Plaintiff is, and at all times hereinafter mentioned was, a citizen and a resident of the State of Ohio.

II.

Defendant, The Western Union Telegraph Company, is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of New York, engaged in business within the County of Los Angeles, State of California, and a common carrier for hire, engaged in interstate and foreign communication by wire within the terms of the Federal Communications Act of 1934 as amended. [2]

III.

The jurisdiction of this Court is based upon the fact that Plaintiff is a citizen of the State of Ohio, and Defendant, The Western Union Telegraph Company, is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of New York, engaged in business within the County of Los Angeles, State of California; and the amount involved in this controversy exceeds \$3,000.00, exclusive of interest and costs [Title 28 U.S.C.A., Section 41(1)].

IV.

At all times herein mentioned, Plaintiff was, and now is, an individual doing business under the fictitious name and style of The Continental Press Service with principal offices located in Cleveland, Ohio, and other offices located in Chicago, Illinois and New York, New York. Plaintiff is engaged in the business of disseminating information of sporting events, including racing news, over the interstate and foreign communication wires and facilities of Defendant to its customers located throughout the United States, and in Canada and Mexico. Such news of sporting events is transmitted to Plaintiff's customers in interstate commerce by use of a Morse wire furnished by Defendant which traverses the United States, extending to Florida, New York, Oregon, California and intermediate states, and reaching into Canada and Mexico. Each of Plaintiff's customers receives its sporting and racing news service by direct con-

nection with the main interstate Morse wire, and each message is simultaneously transmitted from Plaintiff to all of its customers located in the various states throughout the United States, and in Canada and Mexico.

V.

Prior to April 2, 1948, Plaintiff applied to Defendant for, and has been supplied with, interstate Morse [3] wire facilities to be used to supply Plaintiff's customers with news, including sporting and racing news. Such wire facilities included a direct connection from the main line to each customer. Plaintiff paid Defendant for such service, and is willing to continue to pay for such service according to the established rates and billing practices of Defendant. Prior to April 2, 1948, Plaintiff was using the wire facilities supplied by Defendant to transmit its news to each of its customers connected with the interstate wire facilities, including Consolidated Publishing Company of Los Angeles, California, and that company was receiving and paying Plaintiff Five Hundred Dollars per week for the news supplied by Plaintiff over the interstate Morse wire facilities of Defendant. Plaintiff has heretofore relied upon and still does rely upon the Defendant, The Western Union Telegraph Company, for interstate Morse wire facilities to supply its customers with news, including its customer, Consolidated Publishing Company of Los Angeles, California.

VI.

On April 2, 1948, Defendant wrongfully and

without just cause discontinued Plaintiff's interstate Morse wire facilities by which Plaintiff was supplying news to its customers in the State of California, including its customer, Consolidated Publishing Company of Los Angeles, California. Plaintiff's customer, Consolidated Publishing Company of Los Angeles, California, still desires to purchase Plaintiff's news service over the interstate Morse wire facilities, and has so advised Plaintiff. Consolidated Publishing Company was paying Plaintiff Five Hundred Dollars per week for Plaintiff's news service, and the arbitrary discontinuance by Defendant of the facilities described herein, prevents Plaintiff from continuing to sell its service to Consolidated Publishing Company. [4]

VII.

The Consolidated Publishing Company is a partnership engaged in the business of disseminating general news and sporting news, principally racing news, by means of daily and weekly publications generally referred to as scratch sheets, which are sold to the public at news stands, in drug stores, and in other similar establishments throughout the Los Angeles area where newspapers and magazines are customarily sold.

VIII.

Plaintiff has heretofore applied for, and has been supplied with, such interstate Morse wire facilities by Defendant with connections for each of Plaintiff's customers pursuant to said applications

for service. The Morse wire facilities, with connections for each of Plaintiff's customers, have been in service and used by Plaintiff to transmit to said customers news, including sporting and racing news, up to and including April 2, 1948, when Defendant, without just cause, discontinued the interstate Morse wire facilities used by Plaintiff to transmit news to Consolidated Publishing Company.

IX.

Defendant is required by law to supply Plaintiff with interstate Morse wire facilities of the type and kind hereinbefore referred to. Plaintiff cannot transmit its news to the Consolidated Publishing Company over interstate Morse wire facilities unless Defendant is compelled or required by order of this Court to continue to supply Plaintiff with such facilities. Defendant has refused to provide such service to Plaintiff. The refusal and [5] failure of The Western Union Telegraph Company to supply Plaintiff this service, has caused, and will cause, Plaintiff irreparable damage for which Plaintiff has no adequate remedy at law.

X.

The Defendant, The Western Union Telegraph Company, has been, and is, able and has the capacity of rendering the facilities herein prayed for and which were rendered Plaintiff prior to April 2, 1948, on which date Defendant arbitrarily and without proper cause, interrupted and discontinued

such interstate Morse wire service by Plaintiff to Consolidated Publishing Company.

For a Second and Separate Cause of Action, Plaintiff alleges:

I.

Plaintiff refers to Paragraph I of the first cause of action and makes the same a part hereof as if fully set forth herein.

II.

Plaintiff refers to Paragraph II of the first cause of action and makes the same a part hereof as if fully set forth herein.

III.

This action arises and the Court has jurisdiction under Section 406 of the Communications Act of 1934, as amended (48 Stat. 1095; U.S.C., Title 47, Section 406), to compel the Defendant, The Western Union Telegraph Company, a common carrier for hire, engaged in furnishing interstate and foreign communication by wire, to restore transmission service in interstate and foreign communication to Plaintiff upon the same terms and conditions as those given by said Defendant for like communication facilities to any other party or person. [6]

IV.

At all times herein mentioned, Plaintiff was, and now is, an individual doing business under the

fictitious name and style of the Continental Press Service with principal offices located in Cleveland, Ohio, and other offices located in Chicago, Illinois and New York, New York. Plaintiff is engaged in the business of disseminating information of sporting events, including racing news, over the interstate and foreign communication wires and facilities of Defendant to its customers located throughout the United States, and in Canada and Mexico. Such news of sporting events is transmitted to Plaintiff's customers in interstate commerce by use of a Morse wire furnished by Defendant which traverses the United States, extending to Florida, New York, Oregon, California and intermediate states, and reaching into Canada and Mexico. Each of Plaintiff's customers receives its sporting and racing news service by direct connection with the main interstate Morse wire, and each message is simultaneously transmitted from Plaintiff to all of its customers located in the various states throughout the United States, and in Canada and Mexico.

V.

Prior to April 2, 1948, Plaintiff applied to Defendant for, and had been supplied with, interstate Morse wire facilities to be used to supply Plaintiff's customers with news, including sporting and racing news. Such wire facilities included a direct connection from the main line to each customer. Plaintiff paid Defendant for such service, and is willing to continue to pay for such service accord-

ing to the established rates and billing practices of Defendant. Prior to April 2, 1948, Plaintiff was using the wire facilities supplied by Defendant to transmit its news to each of its customers connected with the interstate wire facilities, including Consolidated Publishing [7] Company of Los Angeles, California, and that company was receiving and paying Plaintiff Five Hundred Dollars per week for the news supplied by Plaintiff over the interstate Morse wire facilities of Defendant. Plaintiff has heretofore relied upon and still does rely upon the Defendant, The Western Union Telegraph Company, for interstate Morse wire facilities to supply its customers with news, including its customer, Consolidated Publishing Company of Los Angeles, California.

VI.

On April 2, 1948, Defendant wrongfully and without just cause discontinued Plaintiff's interstate Morse wire facilities by which Plaintiff was supplying news to its customers in the State of California, including its customer, Consolidated Publishing Company of Los Angeles, California. Plaintiff's customer, Consolidated Publishing Company of Los Angeles, California, still desires to purchase Plaintiff's news service over the interstate Morse wire facilities, and has so advised Plaintiff. Consolidated Publishing Company was paying Plaintiff Five Hundred Dollars per week for Plaintiff's news service, and the arbitrary discontinuance by Defendant of the facilities de-

scribed herein, prevents Plaintiff from continuing to sell its service to Consolidated Publishing Company.

VII.

The Consolidated Publishing Company is a partnership engaged in the business of disseminating general news and sporting news, principally racing news, by means of daily and weekly publications generally referred to as scratch sheets, which are sold to the public at news stands, in drug stores, and in other similar establishments throughout the Los Angeles area where newspapers and magazines are customarily sold. [8]

VIII.

Plaintiff has heretofore applied for, and has been supplied with, such interstate Morse wire facilities by Defendant with connections for each of Plaintiff's customers pursuant to said applications for service. The Morse wire facilities, with connections for each of Plaintiff's customers, have been in service and used by Plaintiff to transmit to said customers news, including sporting and racing news, up to and including April 2, 1948, when Defendant, without just cause, discontinued the interstate Morse wire facilities used by Plaintiff to transmit news to Consolidated Publishing Company.

IX.

Defendant is required by law to supply Plaintiff

with interstate Morse wire facilities of the type and kind hereinbefore referred to. Plaintiff can not transmit its news to the Consolidated Publishing Company over interstate Morse wire facilities unless Defendant is compelled or required by order of this Court to continue to supply Plaintiff with such facilities. Defendant has refused to provide such service to Plaintiff.

X.

The Defendant, The Western Union Telegraph Company, has been, and is, able and has the capacity of rendering the facilities herein prayed for and which were rendered Plaintiff prior to April 2, 1948, on which date Defendant arbitrarily and without proper cause, interrupted and discontinued such interstate Morse wire service by Plaintiff to Consolidated Publishing Company. [9]

Wherefore, Plaintiff prays in his first cause of action:

1. That Defendant, his agents, solicitors and employees, and each of them, be perpetually restrained and enjoined from refusing to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California;

2. That this Court issue a preliminary injunction enjoining Defendant from refusing to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California, until the entry of final judgment herein;

3. That this Court issue a temporary restraining order enjoining Defendant from refusing to furnish said service as hereinbefore described until a hearing may be had on the prayer for a preliminary injunction hereinabove prayed for, and Plaintiff prays that such order issue without notice to prevent further irreparable injury to Plaintiff's business as heretofore described;

Plaintiff prays respecting his second cause of action:

1. That this Court issue a permanent mandatory order compelling Defendant to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California;

2. That this Court issue a temporary mandatory order without notice compelling Defendant to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California, pending the hearing on the permanent mandatory order prayed for above; [10]

And Plaintiff further prays for his costs incurred herein; and for such other and further relief as this Court may deem just and proper.

/s/ CHARLES H. CARR,
Attorney for Plaintiff.

(Verified.)

[Endorsed]: Filed April 22, 1948. [11]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Harold V. Belden, being first duly sworn, deposes and says:

That the Consolidated Publishing Company, hereinafter referred to as "Consolidated," is a partnership composed of Edward J. Maloney, Harold V. Belden and Russell Brophy, all residents of the County of Los Angeles, State of California, doing business under the fictitious name and style of Consolidated Publishing Company at 615 North La Brea Avenue, Los Angeles, California.

Consolidated is engaged in the business of disseminating sporting news, principally racing news, by means of daily and weekly publications which it prints in its own plant located at the above address. Consolidated prints and publishes the following [12] daily racing news sheets commonly referred to as "scratch sheets": Metropolitan Scratch Sheet, Reporter Scratch Sheet and Blue Sheet. A morning and an afternoon edition is printed each day except Sunday of the Metropolitan Scratch Sheet and Reporter Scratch Sheet. Its Blue Sheet is printed once daily except Sunday. Each week Consolidated sells approximately 100,000 daily scratch sheets. In addition, Consolidated publishes two weekly sporting papers, the Reporter Weekly and

the Hollywood Observer, which are issued on Friday and have a circulation of 2,800 copies per week.

Consolidated conducts its operations at the address above mentioned and at such place maintains both its offices and printing presses. The real estate is under lease and has an additional two years to run. The printing presses and other equipment owned by Consolidated and used to conduct its business are presently valued at approximately \$100,000.

Consolidated publishes and distributes its scratch sheets six days a week, fifty-two weeks each year, Sundays being excepted. It has approximately sixty-five employees and maintains the usual business offices where its books and records are kept for the purpose of reflecting its social-security program, unemployment insurance, withholding taxes, State and Federal income taxes, city license taxes and various other data necessary to the usual conduct of a business.

Other incidents of Consolidated's business are its union contracts which obligate the company to provide severance and accumulated vacation pay upon termination of employment.

Consolidated's daily and weekly sports publications are sold throughout the State of California, and also in the State of Nevada. The Metropolitan Scratch Sheet is admitted to second-class mailing privileges. The scratch sheets are distributed in Los Angeles by means of route men in a manner

similar to that employed by metropolitan newspapers. [13]

The method of distribution is substantially as follows: Each day a route carrier calls upon a newsstand operator and delivers the number of scratch sheets requested by the news dealer. The following day when the route man calls, he is paid for the sheets delivered the previous day, but allows credit to the newsstand operator for those remaining unsold. Consolidated has no proprietary interest in the newsstands and the relationship between it and the newsstands is solely that of seller and buyer.

In order to develop and increase its circulation, Consolidated offers an additional service in connection with the publication and distribution of its scratch sheets. It carries in each issue an advertisement in which telephone numbers are listed and the public is advised that calls may be made to Consolidated's offices for the purpose of obtaining racing results.

There is no substantial difference between the manner in which the business of Consolidated is conducted and that of the National Scratch Sheet which is published in Los Angeles by a competitor. Both are sold on the newsstands to the public and both permit telephone calls for the purpose of obtaining racing results.

Consolidated received daily news, including racing news, from the Continental Press over the interstate Morse wire facilities of Western Union. Consolidated pays for this news approximately

Five Hundred Dollars per week in accordance with its arrangement with Continental Press Service. This news is used in its daily and weekly publications. Prior to April 2, 1948, Consolidated had been receiving daily service from Continental Press Service over the Western Union interstate Morse wire facilities. On April 2, 1948, this news service was interrupted and discontinued and has not been since restored. Consolidated desires the restoration of this service and is ready, willing and able to continue to purchase news from the Continental Press Service.

Harold V. Belden, being duly sworn, deposes and says: [14]

That he has read the foregoing Affidavit and knows the contents thereof, and that the statements contained therein are true and correct to the best of his knowledge and belief.

/s/ HAROLD V. BELDEN.

Subscribed and sworn to before me this 21st day of April, 1948.

(Seal) /s/ F. A. E. BLOCK,

Notary Public in and for said County and State.

My Commission expires April 1, 1951.

[Endorsed]: Filed April 22, 1948. [15]

[Title of District Court and Cause.]

AFFIDAVIT

State of Ohio,
County of Cuyahoga—ss.

Edward J. McBride, an individual doing business under the fictitious name and style of Continental Press Service, being first duly sworn, deposes and says that Continental Press Service, hereinafter referred to as “Continental Press,” is a sole proprietorship owned by deponent with its principal office located in Cleveland, Ohio, and two other offices located in Chicago, Illinois and New York, New York.

Continental Press is engaged in the business of disseminating general news, including sporting and racing news, over the interstate and foreign Morse wire facilities of The Western Union Telegraph Company, hereinafter referred to as [16] “Western Union.”

Continental Press receives news of all types, principally sporting and racing news from throughout the North American continent, which it transmits over interstate Morse wire facilities of Western Union to its office in Chicago, Illinois. From its Chicago office, the news is sent over interstate Morse wires of Western Union to customers throughout the United States, Canada and Mexico, among which are newspapers, radio stations, and daily racing publications usually referred to as

scratch sheets. The news which the New York office receives from Chicago is relayed over separate interstate Morse wire facilities to eastern customers of Continental Press. When Continental Press has an application for service by a new customer or terminates a contract with an existing customer, it confers with Western Union and arranges for the extension or discontinuance of interstate Morse wire facilities to that particular customer. In each case where a customer is added, Western Union receives additional tariff for the use of the extended interstate wire facilities.

The main interstate Morse wire facilities of Continental Press at the presnt time cross every state in the Union and extend into Canada and Mexico.

Included among the subscribers of Continental Press who are served, directly or indirectly, in the various states, are Associated Press; United Press; Armstrong Publications; George Lawton, Publisher; Wahlmin Press Co., Inc., New York; Yonkers Daily Times, Yonkers, New York; Daily News and Trans-Radio Press, New York City; Illinois Sports News and Illinois News Association, Chicago, Illinois; Daily Sports News, Toronto, Canada; Daily Sports News, Detroit, Michigan; Texas Daily Sports News, Houston, Texas; Howard Sports Daily, Baltimore, Maryland; Harvey A. Jr., Miami, Florida; Daily [17] Sports News, Louisville, Kentucky; Times-Picayune, Daily Sports News, Daily State and Item Publishing Co., New Orleans, Louisiana; Columbus Journal and Columbus Dis-

patch, Columbus, Ohio; Old Pueblo Publishing Co., Tucson, Arizona; Sun Herald, Vancouver, Washington; and Victoria Times, Victoria, B. C. The following radio stations are also served: WTRY and WROW, Troy, New York; WINZ, Miami, Florida; WCAR and WLBK, Detroit, Michigan; WBNX, WFMO and WMCA, New York City; WLAP, Lexington, Kentucky; WITH, WCOM, WSID and WGIS, Baltimore, Maryland; WDAS, Philadelphia, Pennsylvania; and WRIP, Providence, Rhode Island.

General news and sporting news other than racing news, constitute from thirty to fifty per cent of the news furnished by Continental Press to its customers. Customers of Continental Press are free to distribute the news received from it in any manner or fashion they desire. Charges for such news service are based upon area, population, and other similar factors. Continental Press does not have any proprietorship or ownership interest in the business of its customers.

Consolidated Publishing Company of Los Angeles, California, is a customer of Continental Press and, prior to April 2, 1948, received by direct connection with the main interstate line of Continental Press, all types of news, including sporting and racing news, which Continental Press disseminated to its customers. For such service, Continental Press receives approximately Five Hundred Dollars from Consolidated Publishing Company. [18]

Edward J. McBride, being duly sworn, deposes and says that he has read the foregoing Affidavit and knows the contents thereof, and that the statements contained therein are true and correct to the best of his knowledge and belief.

/s/ EDWARD J. McBRIDE.

Subscribed and sworn to before me this 14th day of April, 1948.

(Seal) /s/ JOSEPHINE LEBIT,

Notary Public in and for said County and State.

My Commission expires Mar. 26, 1949.

[Endorsed]: Filed April 22, 1948. [19]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND
TEMPORARY RESTRAINING ORDER

It appearing that the Plaintiff has filed a verified complaint in the above-entitled action demanding either a temporary mandatory order and final mandatory order, or preliminary and final injunction, and praying that a temporary restraining order be issued without notice; and it further appearing from the affidavits of Edward J. McBride and Harold V. Belden filed in support thereof that Defendant, on April 2, 1948, interrupted and discontinued the interstate Morse wire facilities between Plaintiff and its customer, Consolidated

Publishing Company of Los Angeles, California; that Defendant will continue to refuse to provide Plaintiff with interstate Morse wire facilities, which facilities are necessary for the transmission of its general news and sporting news to its customer, Consolidated Publishing Company of Los Angeles, California; that such refusal is contrary to the provisions of the Federal [20] Communications Act of 1934; that without such immediate service, Plaintiff cannot transmit its news to Consolidated Publishing Company; that such refusal to allow Plaintiff to serve this customer will result in irreparable damage and injury to Plaintiff by the permanent loss of the aforementioned Consolidated Publishing Company as a customer for its news; that such continued refusal will result in irreparable loss of Plaintiff's prestige and good will in the Los Angeles area, and it appearing that such irreparable injury and damage will occur before notice can be served and a hearing had on Plaintiff's application for a preliminary injunction or a temporary mandatory order; and good cause appearing,

Therefore, it is hereby ordered that the Defendant, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with the Defendants be, and they are hereby enjoined and restrained from refusing to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, of Los Angeles, California, and De-

fendant is ordered to restore such services from the date of the service of this Order to and including the further order of this Court;

It Is Further Ordered that the Defendant herein show cause, if any there be, before the above-en-
[In margin O'Connor Judge] April
titled Court on the 30th day of ~~May~~, 1948, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard in the courtroom of the Honorable J. F. T. O'Connor, Judge of the said Court in the United States Courts and Post Office Building, Temple and Spring Streets in the City of Los Angeles, County of Los Angeles, State of California, why a preliminary injunction should not issue, enjoining the Defendants from refusing to furnish interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California, or a temporary mandatory order [21] pending the trial of the cause, should not issue ordering defendant to restore the above referred to services, except in accordance with the order of this Court.

It Is Further Ordered that this temporary order shall remain in full force and effect until the 30th day of April, 1948, or until further ordered by this Court.

Issued in the City of Los Angeles, County of Los Angeles, State of California, at Los Angeles on the 22nd day of April, 1948.

/s/ J. F. T. O'CONNOR,
Judge of the United States District Court.

[Endorsed]: Filed April 22, 1948. [22]

[Title of District Court and Cause.]

AFFIDAVIT OF J. W. INWOOD RESPONSIVE TO ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

State of California,
Southern District of California,
County of Los Angeles—ss.

J. W. Inwood, being duly sworn, deposes and says: He is Superintendent of defendant The Western Union Telegraph Company at Los Angeles, California;

The Western Union Telegraph Company is now, and continuously since long prior to 1872 has been, a corporation organized and existing under the laws of the State of New York for the purpose of maintaining and operating a general intrastate and interstate telegraph system and business throughout the United States and other countries;

Prior to the year 1872 the said corporation accepted the [23] provisions of the Act of Congress of July 24, 1866 (14 Stats. p. 221; 47 U.S.C.A. sec. 1) commonly known as the "Post Roads Act," and the provisions of section 536 of the Civil Code of the State of California, and throughout said time has been and still is maintaining and operating a general, intrastate and interstate telegraph system, with its lines along the highways and along and across the lands and waters of California and along the post roads throughout the United States;

At all times mentioned in the complaint defendant has been and still is maintaining and operating a public utility intrastate and interstate telegraph

system, under the control and regulation, as to its intrastate operations, of the Public Utilities Commission of the State of California, and, as to its interstate operations, of the Federal Communications Commission;

At all of the times mentioned in the complaint herein the Federal Communications Commission of the United States has, by its order in that behalf duly given and made, fixed and established defendant's "Tariff F.C.C. No. 219" governing the leasing and use of facilities such as those furnished by defendant to plaintiff and described in the complaint. Page 7 of said Tariff No. 219 has at all times mentioned in the complaint provided as follows:

"(8) The service: Leased Facility service as covered in this tariff consists of furnishing for the private use of customers, facilities for transmitting electrical signals between specified points. The furnishing of Leased Facility service is subject to the availability of facilities and equipment after considering the requirements of the Telegraph Company's telegraph message services. Further, the rates and regulations provided in this tariff contemplate the furnishing of service only to points and locations where [24] the Telegraph Company has facilities or can provide them at reasonable cost. All cases not meeting these requirements are subject to special consideration.

"Facilities furnished under this tariff may be employed only for the private use of those companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives and each such office shall transmit and receive its particular communications over the

equipment installed therein. Further, such facilities shall not be used either directly or indirectly for the handling of communications for the public or any person, firm or corporation other than those whose offices are connected to the circuits or their affiliated and subsidiary companies and their representatives. (Note: The restrictions set forth in this paragraph do not apply to facilities furnished to another communication common carrier.)”

The fifth revised page 8 (and the predecessor pages 8) of said Tariff No. 219 has, at said times, provided and continues to provide as follows:

“Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law”;

The facilities and services furnished to plaintiff by defendant described in the complaint herein are known as “Leased [25] facilities” and also as “Private line service and circuits”;

Said private line service and circuits leased to plaintiff by defendant consist of a continuous telegraph wire or channel under the exclusive control of plaintiff for telegraph communication between designated terminals in different states of the United States, with intermediate stations or drops at specified points, including the points in California designated in the letter of the Attorney General of the State of California to defendant

dated March 31, 1948, hereinafter referred to. At each such terminal and at each such intermediate station or drop there is a Morse telegraph instrument. The telegraph operator and all other persons attending to each terminal and station or drop are employed by and are under the exclusive control of plaintiff. Defendant at no time has had any connection whatever with either or any of said employees. Each telegraph communication initiated at any of said terminals or drops is transmitted over said private line or circuit to each terminal and to every station or drop on said private line or circuit—in other words, said private line or circuit and each terminal and drop thereon has been at all times operated exclusively by plaintiff, and the service thereon and thereby is entirely under plaintiff's exclusive control; defendant merely maintains said private line and circuit in operating condition;

At all of the times mentioned in the complaint said Tariff No. 219, page 7, prescribed by the Federal Communications Commission and Tariff Sheets Nos. 1399T and 1400T, prescribed by the California Public Utilities Commission, have contained and still contain the following identical language governing the public utility private line services and circuits furnished to plaintiff by defendant:

“In view of the fact that the subscriber has [26] exclusive control of his communications over the facilities furnished him by the Telegraph Company, and of the other uses for which facilities may be furnished him by the Telegraph Company, and because of unavoidsableness of errors incident to the services and to the use of such facilities of the Telegraph Company, the services and facilities furnished by the Telegraph Company are subject

to the terms, conditions and limitation herein specified and to such particular terms, conditions and limitations as are set out in the schedules applicable to particular services and facilities.”

No step has been taken by plaintiff or anyone else, to affiant’s knowledge, to obtain any change or modification in said page 7 or revised page 8 of said “Tariff FCC 219” or for modification or change of said Tariff Sheets Nos. 1399T and 1400T of the California Public Utilities Commission or the order of the latter Commission, dated April 6, 1948, hereinafter referred to, or to have either said tariff provisions or said order declared unreasonable or otherwise objectionable;

All, each and every of the services and facilities provided by defendant to plaintiff described in the complaint herein were furnished by defendant pursuant to the Tariffs and Regulations prescribed and established by the duly constituted Regulatory authorities and applications made by plaintiff to defendant. Neither of said applications stated that the facilities applied for were “to be used to supply plaintiffs customers with news, including sporting and racing news” (see complaint, page 2, line 31, to line 2, page 3) or for any other specified purpose, and the facilities furnished by defendant to plaintiff were as hereinafter stated and not otherwise; [27]

Each and every of said applications was executed by or on behalf of plaintiff, was delivered to defendant and accepted by the latter at 60 Hudson Street, New York City, and declared as follows:

“The undersigned agrees that the facilities furnished under this tariff shall not be used for any

purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law. This application shall become binding on both parties when accepted by the Company, such acceptance to be evidenced by the signature of one of its officers hereon or by the establishment of the service.”

On receipt of each such application and pursuant thereto, and in accordance with the lawfully established orders, regulations and tariffs prescribed by the regulatory authorities, defendant furnished the private line public utility facilities and services so applied for;

Defendant continued to maintain said leased private telegraph wire and drops in operating order for the private use of defendant until directed by the Attorney General and chief law enforcement officer of the State of California to discontinue the “drops” at the places specified in his letter of March 31, 1948, as hereinafter set forth;

Plaintiff has at all times had exclusive control of the communications over and by means of said facilities, and defendant has never policed, monitored or otherwise supervised or observed [23] the use of said facilities or any communications transmitted by means thereof, and has not been informed of any such communications or the use of said facilities otherwise than by the letter of March 31, 1948, from Attorney General Howser, and by the proceedings before the California Public Utilities

Commission referred to in said letter, and in the letter of March 4, 1948, from the District Attorney and the Sheriff of Kern County and the Chief of Police of Bakersfield, California, hereinafter referred to;

With reference to the discontinuance of service referred to in Paragraph VI of the complaint herein, affiant states that such discontinuance was not arbitrary, wrongful or without just cause, but that on the contrary, the facts with reference thereto are as follows:

At a time prior to February 18, 1948, the Public Utilities Commission of the State of California initiated that certain proceeding before said Commission entitled, "Case No. 4930; Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest";

Defendant was notified of said proceedings and appeared at the hearings had in the course thereof;

Testimony was taken by said Commission in said proceeding on February 18, 19, 25, 26, and March 10, 1948, and decision and order thereon were made on April 6, 1948;

Throughout the pendency of said proceeding before said Public Utilities Commission, Honorable Fred N. Howser was and still is the Attorney General and chief law enforcement officer of the State of California, and as such appeared in said proceeding; [29]

March 4, 1948, defendant received at its Bakersfield office, 1605 19th Street, Bakersfield, Califor-

nia, letter signed by Tom Scott, District Attorney of Kern County, California, J. E. Loustalot, Sheriff of Kern County, and H. V. Grayson, Chief of Police, Bakersfield, notifying defendant that defendant's telegraph instrument and wire (being part of the private line service and circuits leased by defendant to Continental Press Service) located at 1911 Edison Highway, Bakersfield, Kern County, California, had been and were on March 4, 1948, being used to violate section 337a and section 182 of the Penal Code of California, and requesting that defendant immediately discontinue said service and disconnect said telegraph instrument and wire at said address;

Following receipt of the letter just referred to, defendant discontinued the use of said wire and telegraph instrument at said 1911 Edison Highway, Bakersfield, California, on March 5, 1948, and service of said instrument and wire have not since been resumed;

On March 31, 1948, said Honorable Fred N. Howser, as Attorney General and chief law enforcement officer of California, signed and caused to be delivered to defendant a letter notifying defendant that defendant's facilities and services (being part of the private line service and circuits leased by defendant to plaintiff) at the following addresses:

333 Montgomery Street, San Francisco
1911 Edison Highway, Bakersfield
181 Andreas Road, Palm Springs
Room 211, Platt Building, San Bernardino
362 D Street, San Bernardino
208 West Eighth Street, Los Angeles
615 North La Brea, Los Angeles
919 Fourth Avenue, San Diego. [30]

were being used to furnish information to book-makers in violation of section 337a of the Penal Code of California, and in said letter the Attorney General, "as chief law enforcement officer of this State," demanded that defendant immediately discontinue the leasing of its facilities and service to plaintiff in California. Copy of said letter of said Attorney General to defendant is hereto attached, made a part hereof, and marked "Exhibit A";

Pursuant to and because of the demand of the Attorney General and chief law enforcement officer of the State of California of March 31, 1948, and the demand of the District Attorney, and Sheriff of Kern County and the Chief of Police of Bakersfield of March 4, 1948, defendant discontinued and it continues to discontinue its facilities and service to plaintiff which are described in said letter of the Attorney General;

The facilities and services so discontinued are the part of plaintiff's facilities and services referred to in the complaint herein which are in the State of California;

Promptly upon receipt of the respective letters of March 4 and March 31, 1948, above referred to, defendant informed plaintiff of the receipt of said letters and of defendant's intention to comply therewith, and thereafter said facilities and services were discontinued;

On or about the 6th day of April, 1948, said Public Utilities Commission of the State of California, in said case No. 4930, entitled as aforesaid, duly made and promulgated the following order:

"The above entitled case having been instituted on the Commission's own motion, public hearings having been held therein, said case now being ready

for decision, the Commission being fully advised in the premises and basing its decision [31] upon the evidence of record in this case and upon the findings of fact contained in the foregoing opinion,

“It Is Hereby Ordered that any communications utility operating under the jurisdiction of this Commission must refuse to establish service for any applicant, and it must discontinue and disconnect service to a subscriber, whenever it has reasonable cause to believe that the use made or to be made of the service, or the furnishing of service to the premises of the applicant or subscriber, is prohibited under any law, ordinance, regulation, or other legal requirement, or is being or is to be used as an instrumentality, directly or indirectly, to violate or to aid and abet the violation of the law. A written notice to such utility from any official charged with the enforcement of the law stating that such service is being used or will be used as an instrumentality to violate or to aid and abet the violation of the law is sufficient to constitute such reasonable cause.

“It Is Further Ordered that any person aggrieved by any action taken or threatened to be taken pursuant to the provisions of this decision shall have the right to file a complaint with this Commission in accordance with the law. This remedy shall be exclusive. Except as specifically provided herein, no action at law or in equity shall accrue against any communications utility because, or as a result of, any matter or thing done or threatened to be done pursuant to the provisions of this decision.

“It Is Further Ordered that each contract for communications service, by operation of law, shall

be deemed to contain the provisions of this decision, whether or not the same be actually included as a part of the application for [32] such service, and the provisions of said decision shall be deemed in law to be a part of any application for communications service, and the applicant for such service shall be deemed to have consented to the provisions of said decision as a consideration for the furnishing of such service. The term 'person', as used in this decision, shall include a subscriber to communications service, an applicant for such service, a corporation, a company, a co-partnership, an association, a political subdivision, a public officer, a governmental agency, and an individual.

"The term 'communications utility,' as used in this decision, includes a 'telephone corporation' and a 'telegraph corporation,' as those terms are defined in the Public Utilities Act. The secretary is hereby directed to serve, by registered mail, a certified copy of this decision upon each communications utility operating under the jurisdiction of this Commission and upon each appearance of record herein."

Copy of said order and decision was, prior to the filing of the complaint herein, transmitted by said Commission to and was received by defendant.

So far as known to affiant, no complaint has ever been made by plaintiff or by any one in plaintiff's behalf to the California Public Utilities Commission or to the Federal Communications Commission, or to any other officer or Commission, other than the complaint in this action, stating or claiming that plaintiff is or has been aggrieved by any Tariff, order or regulation of either of said Commissions herein referred to, or by said discontinu-

ance of said facilities and service, or any thereof, and said Tariffs and said order of the California Public Utilities Commission of April 6, 1948, are still in full force and effect. [33]

All of the acts and conduct of defendant referred to in the complaint and in this affidavit have been pursuant to, in reliance upon, and in conformity with the established Tariffs and orders prescribed by the Federal Communications Commission and the California Public Utilities Commission, and in reliance upon the representations and demands of State law enforcement officers as herein stated, and defendant has done no act or thing in violation of any law and has not refrained from doing or refused to do anything required by law, and has not in any manner prevented plaintiff from receiving intrastate or interstate telegraph service at the same charges, upon the same terms, and on conditions as favorable as like services by defendant are available under similar conditions to any other person.

/s/ J. W. INWOOD

Subscribed and sworn to before me this 4th day of May, 1948.

(Seal) /s/ JEAN F. CROWE,

Notary Public in and for said County and State.

My Commission expires May 28, 1949. [34]

EXHIBIT A

State of California
Department of Justice

OFFICE OF THE ATTORNEY GENERAL
600 State Building, Los Angeles 12

March 31, 1948

Western Union Telegraph Company
722 Market Street
San Francisco, California
Attention: General Manager

Gentlemen:

A survey of the transcript of the proceedings of February 18, 19, 25 and 26, and of March 10, 1948, before the Public Utilities Commission of the State of California at its hearings pertaining to the illegal use of Western Union wire services and/or telephonic equipment, indicates that you had leased wires to the Continental Press Service, which were and are engaged in furnishing information to book-makers in violation of Section 337a of the Penal Code of the State of California, at the following addresses:

333 Montgomery Street, San Francisco

1911 Edison Highway, Bakersfield

181 Andreas Road, Palm Springs

(Investigation by this office indicates the true location to be at 179 Andreas Road)

Room 211, Platt Building, San Bernardino

362 D Street, San Bernardino

208 West Eighth Street, Los Angeles

615 North La Brea, Los Angeles

919 Fourth Avenue, San Diego [35]

The transcript of the above mentioned proceedings sets out a provision of the contract as given

by you, Western Union, to the Continental Press Service in California, and I quote:

“The undersigned (i.e., Continental Press Service) agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcement agencies that the service is being supplied contrary to law.”

Pursuant to this quoted portion of your contract, by virtue of the terms and conditions therein contained, you are hereby notified that I, as Attorney General of the State of California, being designated as Chief Law Enforcement Officer of this State by our Constitution, do hereby demand that you immediately discontinue the leasing of any and all equipment to the Continental Press Service in California.

Very truly yours,

/s/ FRED N. HOWSER,

Attorney General of California.

FNH*md

cc Warren Olney, III, Counsel
Commission on Organized Crime
1204 Balfour Building
San Francisco 4

Received copy of the within this 5th day of May,
1948.

CHARLES H. CARR,
Attorney for Plaintiff.

[Endorsed]: Filed May 5, 1948. [36]

[Title of District Court and Cause.]

ANSWER

Comes now defendant above named, and for answer to the complaint, denies, avers and alleges, as follows:

I.

Admits the allegations of Paragraph I of the complaint.

II.

Admits the allegations of Paragraph II of the complaint.

III.

Answering Paragraph III of the complaint, defendant alleges that it is now, and at all times since prior to the year 1872, it has been, a corporation organized and existing under the laws of the State of New York, for the purpose of maintaining and operating, and has been and is maintaining and operating a general public [37] utility, intrastate and interstate telegraph system and business throughout the United States, including the State of California; and continuously since its organization defendant has accepted and exercised and continues to accept and exercise the right, privilege and franchise tendered by the Act of Congress of July 24, 1866 (14 Stats. p. 221), commonly known as the "Post Roads Act," to use the post roads throughout the United States for its public utility telegraph lines, and has accepted and exercised, and continues to accept and exercise, the right, privilege and franchise tendered by section 536 of the Civil Code of the State of California to construct, maintain and operate its telegraph lines

along and upon the public highways and along and across the lands and waters of the State of California.

IV.

Answering Paragraph IV of the complaint, defendant alleges that it has no knowledge or information sufficient to enable it to answer with regard thereto, and therefore and upon that ground denies that plaintiff is or at any time has been engaged in the business of disseminating information of sporting events or racing news either over the interstate and foreign communication wires and facilities of defendant or otherwise either to plaintiff's customers located throughout the United States or in Canada or in Mexico, or to any other persons or places;

Upon the same ground, defendant denies that news of sporting events is or has been transmitted to plaintiff's customers, either in interstate commerce or otherwise, by the use of a Morse wire or any wire furnished by defendant, to Florida, New York, Oregon, California or to intermediate states, or into Canada or Mexico, or to any other place or places;

Upon the same ground, denies that each or any of plaintiff's [38] customers receives or has received plaintiff's sporting or racing news service or any news service by direct or other connection with the main or other interstate or other Morse wire, or any wire belonging to or operated by defendant.

V.

Answering Paragraph V of the complaint, defendant alleges:

The leasing and operation of defendant's public utility facilities and service is now and at all times in the complaint mentioned, has been, as to interstate facilities and service, under the plenary control of the Federal Communications Commission, and, as to its intrastate operations and service in California, under the plenary control of the California Public Utilities Commission;

All of defendant's facilities and services which have been furnished to plaintiff as alleged in the complaint have been so furnished pursuant to, in accordance with, and as required by the Tariffs, schedules, rules, regulations and orders of the Federal Communications Commission, upon applications made by plaintiff as hereinafter stated;

At all of the times mentioned in the complaint Federal Communications Commission Tariff No. 219 has governed and controlled and continues to govern and control the operations, service and conduct of defendant in the leasing of its interstate, public utility communications facilities and services;

Throughout said time said Tariff No. 219 has provided and required, and continues to provide and require as follows:

"The Western Union Telegraph Company—Tariff F.C.C. No. 219—Original Page 7.

LEASED FACILITIES

(8) The service: Leased Facility service as covered in this tariff consists of furnishing for the private [39] use of customers, facilities for transmitting electrical signals between specified points. The furnishing of Leased Facility service is subject to the availability of facilities and equipment after considering the requirements of the Telegraph Company's telegraph message services. Further, the rates and regulations provided in this tariff contemplate the furnishing of service only to points and locations where the Telegraph Company has facilities or can provide them at reasonable costs. All cases not meeting these requirements are subject to special consideration.

Facilities furnished under this tariff may be employed only for the private use of those companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives and each such office shall transmit and receive its particular communications over the equipment installed therein. Further, such facilities shall not be used either directly or indirectly for the handling of communications for the public or any person, firm or corporation other than those whose offices are connected to the circuits or their affiliated and subsidiary companies and their representatives. (Note: The restrictions set forth in

this paragraph do not apply to facilities furnished to another communication common carrier.)

Issued: February 24, 1941.

Effective: March 31, 1941'';

At all of the times mentioned in the complaint said F.C.C. Tariff No. 219 has also provided and required, and continues to provide and require that facilities and service leased by defendant

“shall not be used either directly or indirectly for the handling of communications for the public or any person, [40] firm or corporation other than those whose offices are connected to the circuits or their affiliated and subsidiary companies and their representatives’’;

Said Tariff F.C.C. No. 219 has, throughout said time provided and required and continues to provide and require that:

“Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law’’;

On or about May 19, 1945, defendant received at its general offices, No. 60 Hudson Street, New York

City, New York, from Continental Press Service (said Continental Press Service being, as defendant is informed and believes, the name under which plaintiff was at the time doing, and continues to do business) application in writing that defendant lease to said Continental Press Service certain of defendant's public utility telegraph facilities and services, including a Morse operated private telegraph line from the City of Chicago, Illinois, to the City of Seattle, Washington, by way of Los Angeles and San Francisco, California, and Portland, Oregon, and intermediate cities, with "drops" connected with said leased line at various points in the several states traversed by said line, including points in California;

Defendant alleges that said application did not state that the facilities and service applied for or any part thereof [41] were to be used for any particular purpose other than the transmission of telegraph communications generally, and did not state that the facilities or service were to be used to supply plaintiff's customers or any one else with sporting and racing news, but, on the contrary, defendant alleges the fact to be that said application contained no statement as to the nature of telegraphic communications which plaintiff or any one else intended to transmit by means of said facilities and service;

Plaintiff's said application to defendant of May 19, 1945, contained the following statement:

"The undersigned requests The Western Union

Telegraph Company to furnish, subject to and in accordance with its lawful rates and regulations, the service described (including such modifications therein as may be ordered from time to time), for the established minimum period and thereafter until terminated by written notice from the undersigned, unless earlier terminated by the Company pursuant to its regulations, and agrees to pay for such service according to the Company's established billing practices. The undersigned agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law. This application shall become binding on both parties when accepted by the Company, such acceptance to be evidenced by the signature of one of [42] its officers hereon, or by the establishment of the service'';

On or about May 19, 1945, defendant accepted said application, and pursuant thereto and in accordance with the Tariffs, Regulations and Orders prescribed by the Federal Communications Commission, including said Tariff F.C.C. No. 219, defendant leased and furnished to plaintiff the telegraph facilities and service so applied for, for

the private use of said Continental Press Service; said facilities and service consisted of a private telegraph wire or channel for telegraph communication from Chicago, Illinois, by way of Los Angeles, San Francisco, Portland, Oregon, and intermediate cities in states traversed by said wire, to Seattle, Washington, with connecting wire or channels (commonly called "drops") extending from said private leased wire or channel at various points and places in the states traversed by said line, including the places in California hereinafter mentioned; at the respective terminals of said private wire or channel and at each "drop" therefrom, including "drops" at said points in California, hereinafter mentioned, the facilities and service so leased to plaintiff included a Morse telegraph instrument;

On March 4, 1948, and for a long time prior thereto, and continuously thereafter until April 2, 1948, "drops," including a Morse telegraph instrument as a part thereof, were maintained as a part of said leased private wire at each of the following places in California:

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Springs,
Room 211 Platt Building, San Bernardino,
362 D Street, San Bernardino,
208 West Eighth Street, Los Angeles,
919 Fourth Avenue, San Diego; [43]

Each of said "drops" was so maintained and

operated as that any message initiated at any such drop could be and was immediately transmitted to all other drops in the various states traversed by said leased wire, including all of said drops connected with said leased wire in California;

The premises at the terminals of said leased wire and at each place where such "drops" were connected were not under any control of defendant, but were, as defendant is informed and believes, under the exclusive control of plaintiff or of plaintiff's affiliates or subsidiaries;

The telegraph operator, and all other attendants and employees, at each of said "drops" and at all other places on said leased wire, were at all times employed by, and were under the exclusive control of plaintiff, and defendant had nothing to do either with the employment or services of any of such persons or of any one engaged in the transmission of messages or communications over or by means of said leased facilities and services, or with any such message or communication;

Under and pursuant to said Federal Communications Commission Tariff No. 219, all of the facilities and services so leased to plaintiff were required to be, and at all times were, for the exclusive private use of plaintiff and plaintiff's affiliates and subsidiaries, and the use and operation of said facilities and service and the transmission and receipt of communications by means thereof were at all times under plaintiff's exclusive control;

At no time did defendant or any one on defend-

ant's behalf have or exercise any control or supervision whatever over any use of said facilities and service so leased to plaintiff, or over any message or other communication transmitted by means thereof, nor did defendant at any time have any knowledge as to the purpose [44] of any such communication or message or the use made or intended to be made by plaintiff or anyone else of any such message or communication;

Defendant's sole contact with the facilities and service so leased to plaintiff was for the purpose of seeing that the same were kept in working order.

VI.

Defendant denies that on April 2, 1948, or at any other time or at all it wrongfully or arbitrarily or without just cause discontinued the interstate or any other facilities or service furnished by defendant to plaintiff, but, on the contrary, alleges that the facts in that respect were and are as follows, and not otherwise:

Prior to February 18, 1948, the California Public Utilities Commission, on its own motion, initiated a certain proceeding before said Commission entitled, "Case No. 4930; Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest";

Said California Public Utilities Commission, in the course of said proceedings, heard testimony on February 18, 19, 25 and 26, and March 10, 1948, and rendered its decision and made its order therein on April 6, 1948. Copy of said decision and order is hereto attached, and is hereby referred to and made a part hereof to the same extent as if here set forth in full, and marked "Exhibit A";

Throughout said proceeding, Honorable Fred N. Howser was, and ever since January 1, 1947, has been and still is the Attorney [45] General and chief law enforcement officer of the State of California; as such Attorney General and chief law enforcement officer, he appeared and participated in said hearing before said Commission;

On March 4, 1948, defendant received letter signed by Tom Scott, then and now District Attorney of Kern County, California, J. E. Loustalot, then and now Sheriff of said Kern County, and H. V. Grayson, then and now Chief of Police of the City of Bakersfield, California, stating that defendant's telegraph instrument and wire (being part of the private line service and circuits leased by defendant to Continental Press Service, as aforesaid) located at 1911 Edison Highway, Bakersfield, Kern County, California, had been and were on March 4, 1948, being used to violate section 337a and section 182 of the Penal Code of California, and demanding that defendant immediately disconnect and discontinue said telegraph instrument and wire at said address. Copy of said

letter is hereto attached, marked "Exhibit B" and is here referred to and made a part hereof to the same extent as if here set forth in full;

On March 31, 1948, defendant received from said Honorable Fred N. Howser, as Attorney General and chief law enforcement officer of the State of California, letter stating that defendant's facilities and service (being part of the facilities and service so leased by defendant to plaintiff as aforesaid) at each of the addresses in said letter set forth, were being used in violation of the laws of the State of California, and demanding that defendant immediately discontinue the facilities and service to plaintiff in said letter described; copy of said letter is hereto attached, marked "Exhibit C," and is here referred to and made a part hereof to the same extent as if here set forth in full;

Immediately following receipt of said letters of March 4, 1948, and March 31, 1948, just referred to, defendant informed [46] plaintiff of such receipt and of its intention to comply with the demands made therein. On April 2, 1948, defendant, pursuant to and in reliance upon the statements and representations made in said letters, and in the belief that said representations and statements were true and that the facilities described in said letters were being used and service supplied by means thereof for the purpose of violating the laws of the State of California, discontinued the facilities and service so leased by it to plaintiff at the places and points specified in said letters, and immediately informed plaintiff of such discontinuance;

On April 6, 1948, said Public Utilities Commission of the State of California rendered its decision and made its order in said Case No. 4930, as set forth in Exhibit A hereto attached;

Copy of said decision and order was caused by said Commission to be transmitted to and was received by defendant, and, as defendant is informed and believes, and, therefore states the fact to be, plaintiff was fully informed with reference thereto prior to the filing of the complaint in this action;

Pursuant to and in reliance upon said F.C.C. Tariff No. 219, and the above quoted stipulation by plaintiff in its application to defendant of May 19, 1945, and because of, pursuant to, and in reliance upon the truth of said letter from said District Attorney and Sheriff of Kern County, California, and the Mayor of Bakersfield of March 4, 1948, and because of, pursuant to and in reliance upon the truth of the letter from the Attorney General of California, of March 31, 1948, the part of defendant's said facilities and service so leased to plaintiff located at the points stated in said letters was disconnected and discontinued, and, because of, pursuant and in obedience to and in reliance upon the decision and order of said California Commission attached hereto and marked [47] Exhibit A, as aforesaid, defendant has continued to discontinue and disconnect said facilities and services.

VII.

Defendant has no knowledge, information or be-

lief upon the subject sufficient to enable it to answer with regard thereto, and therefore and on that ground denies that Consolidated Publishing Company is a partnership or that said partnership is or at any time has been engaged in the business of disseminating either general, sporting or racing news either by means of daily or weekly publications referred to as "scratch sheets" or otherwise.

VIII.

Defendant further alleges that discontinuance by it of the facilities and service so leased to plaintiff as aforesaid was in reliance upon and in the belief that the statements and representations made to it in said letters from the Attorney General of California and from the District Attorney and the Sheriff of Kern County and the Chief of Police of the City of Bakersfield, California, were and are true, and in the belief, based on such reliance, that defendant's facilities and service so leased to plaintiff were being used and service was being supplied thereby for the purpose of instigating and encouraging the unlawful acts condemned by sections 337a and 182 of the Penal Code of California, and said discontinuance of service has been continued also in reliance upon the decision and order of the California Public Utilities Commission of April 6, 1948 (Exhibit A hereto attached) and upon Federal Communications Commission Tariff No. 219, page 8, hereinbefore quoted and referred to, and upon the stipulation in plaintiff's application of May 19, 1945, heretofore referred to.

IX.

Admits that plaintiff has applied to defendant for and [48] has been supplied by defendant with interstate Morse wire facilities, but alleges that such facilities and service were and are as hereinbefore described, and not otherwise, and that the furnishing thereof has been under, pursuant to, and in accordance with the Tariffs, rules, regulations and orders of the public regulatory bodies and the application of plaintiff, all as hereinbefore stated, and not otherwise, and defendant denies that it has disconnected or discontinued such facilities or service, or that it continues to disconnect or discontinue the same arbitrarily or without just cause, or otherwise than as hereinbefore stated.

X.

Defendant has no information or belief upon the subject sufficient to enable it to answer with regard thereto, and therefore and on that ground denies that plaintiff cannot transmit its news to Consolidated Publishing Company or to any other company or person over interstate Morse wire facilities unless defendant is compelled or required by order of this court to continue to supply plaintiff with such facilities;

Denies that defendant has refused to provide such service or facilities to plaintiff, but, on the contrary, alleges the fact to be that it is now and at all times has been ready and willing to furnish facilities and service to plaintiff and to all other persons in accordance with the Tariffs, Rules and

Regulations of the Federal Communications Commission and of the California Public Utilities Commission, and in such manner as not, by means of such facilities and service, to violate any law of the United States or the State of California or of any other State.

XI.

Defendant denies that its failure to supply plaintiff with its facilities and service has caused or will cause plaintiff [49] irreparable or any damage;

Denies that plaintiff has no adequate remedy at law; on the contrary, alleges the fact to be that plaintiff has and at all times has had the right and privilege of applying to the Federal Communications Commission to change, modify or abolish the provisions of said Tariff No. 219 heretofore quoted, under and pursuant to which said facilities and service were discontinued as aforesaid, if, as plaintiff alleges, said provisions or some one or more thereof are arbitrary or otherwise unreasonable, or if plaintiff is otherwise aggrieved thereby, and plaintiff has at all times had and still has the right and privilege of making like application to the California Public Utilities Commission to change, modify or abolish said Tariffs 1399T and 1400T and said order of April 6, 1948, if either said Tariff or said order is unreasonable or if plaintiff is aggrieved thereby;

That because of the plenary power and control of said Federal Communications Commission and the California Public Utilities Commission over

the conduct, operations and services of defendant, defendant had and has no option except to strictly conform to and abide by the Tariffs, regulations, rules and orders of said Commissions within their respective jurisdictional spheres, and it has so conformed.

XII.

Defendant alleges that it has not, in any manner or at all, prevented plaintiff or any other person from receiving any service from defendant, either in interstate or foreign communication or otherwise or at all by wire or otherwise, at the same charges, and upon terms or conditions as favorable as the charges, terms and conditions given by defendant for like communication under similar conditions to any other person. [50]

XIII.

Defendant alleges that there is and has been no application by the Attorney General of the United States or request by the Federal Communications Commission for the filing of this or any action, nor any allegation by either said Attorney General or said Commission of failure by defendant to comply with, or that defendant has violated any of the provisions of Chapter 5, Title 47 of the United States Code, and that this action was commenced and is being maintained without any such application or request. [51]

ANSWER TO SECOND CAUSE OF ACTION

Answering the second and separate cause of action, defendant denies, avers and alleges as follows:

I.

Defendant hereby refers to and makes a part hereof, to the same extent as though set out in full herein, paragraphs I to XIII, inclusive, of the foregoing answer to plaintiff's first alleged cause of action.

II.

Defendant has no information or belief upon the subject sufficient to enable it to answer with regard thereto and therefore on that ground denies that plaintiff is, or at any time has been, engaged in the business of disseminating information of sporting events or racing news, either over interstate and foreign communications wires and facilities of defendant or otherwise; upon the same ground denies that any such news is transmitted to plaintiff's customers in interstate commerce by the use of a Morse code furnished by defendant; upon the same ground denies that plaintiff, or each or any of plaintiff's customers, receives or has received any sporting or racing news service by direct connection with main interstate Morse wire, or that each or any sporting or racing news message is transmitted to all or any of plaintiff's customers.

III.

Defendant alleges that its public utility telegraph facilities and service have been furnished to plaintiff as in this answer heretofore stated, and not otherwise; that said facilities and service were

furnished pursuant to application of plaintiff and in accordance with the Tariffs, rules and regulations of the Federal Communications Commission and the Tariffs, rules and regulations of the California Public Utilities Commission, as in this answer [52] heretofore stated, and that the discontinuance of said facilities and service was, and continuance of such discontinuance is as stated in this answer, and not otherwise, and that such discontinuance of service was and is as required and demanded by law enforcement officers of the State of California as hereinbefore stated, and pursuant to and in accordance with the Tariffs, rules, regulations and orders of said Federal and State Commissions and as authorized by plaintiff's express agreement set forth in plaintiff's application to defendant for such service, all as hereinbefore in this answer set forth, and not otherwise.

IV.

Defendant has been and is, by the order of said California Public Utilities Commission, dated April 6, 1948, forbidden to resume such facilities and service to plaintiff.

Wherefore defendant prays that it be hence dismissed and for its costs.

LAWLER, FELIX & HALL,
OSCAR LAWLER,
/s/ OSCAR LAWLER,

Attorneys for defendant, The Western Union
Telegraph Company. [53]

EXHIBIT "A"

Decision No. 41415

Before the Public Utilities Commission of the
State of California

Case No. 4930

Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest.

F. V. Rhodes and Marshall K. Taylor, for California Independent Telephone Association; Marshall K. Taylor, for Associated Telephone Company, Limited, San Joaquin Associated Telephone Company, and Consolidated Telephone Company; Pillsbury, Madison & Sutro, by John A. Sutro and Francis N. Marshall, for Pacific Telephone and Telegraph Company; Pillsbury, Madison & Sutro, by Hugh Fullerton and Henry G. Hayes, for Western Union Telegraph Company, respondents. Fred N. Howser, Attorney General, for the State of California, John H. Hanson, Chief Investigator of the Special Crime Study Commission on Organized Crime, for the State of California; Roger Arnebergh, for the City of Los Angeles; Warren Olney, for State Commission on Organized Crime; Everett

C. McKeage and Roderick B. Cassidy of the Commission's Staff, appearing for the Public Utilities Commission.

OPINION

Public hearings in this matter were held, before Commissioner Huls and Examiner Syphers, on February 18 and 19, 1948, at Los Angeles, February 25 and 26, 1948, at San Francisco, and March 10, 1948, at Sacramento. On these dates evidence was adduced and on the last-named date the matter was submitted.

These hearings were initiated on the Commission's own motion after the Commission had informally considered the subject matter of the instant investigation and after the receipt of a letter,¹ dated December 12, 1947, from the Special Crime Study Commission on Organized Crime, alleging that organized bookmaking [18] and the so-called "wire service" on which it depends are able to exist only because of their extensive use of the facilities of communications utilities.

The provisions of Section 337a of the Penal Code denounce bookmaking as a public offense.

At the hearing, testimony was introduced by the Attorney General of the State of California which included information showing the number of arrests for bookmaking,² by counties, in the State, the

¹ Exhibit No. 2.

² As used in this respect bookmaking refers to any arrangements for the taking of off-track bets on horse racing.

number of telephones seized by police officers, the number of convictions for bookmaking, and various other information.³ These exhibits clearly indicate that there has been a large amount of bookmaking conducted in the State of California, particularly in the more populous counties such as Alameda, San Diego, San Francisco, and Los Angeles. Testimony was received from the Sheriffs of Imperial, Los Angeles, and Alameda Counties, from the Chiefs of Police of the Cities of Long Beach, Los Angeles, Fresno, Merced, and Stockton, from the U. S. Attorney for the Southern District of California, and from the District Attorneys of Los Angeles, San Diego, Stanislaus, Alameda, and Sacramento Counties, all of which testimony indicated that bookmaking is a major law enforcement problem. This testimony further indicated [56] that bookmaking is a definite evil in that it promotes gangsterism, contributes to delinquency and non-support, and fosters, within the public itself, a disrespect for law enforcement. These officials were practically unanimous in stating that every effort should be made to stamp out bookmaking and they further stated that bookmakers were almost completely dependent upon the use of telephone and telegraph facilities. It was the conclusion of these

³ Exhibit No. 3 showed this information as related to cases handled by District Attorneys throughout the State; Exhibit No. 4 showed the same information as to cases handled by Sheriffs' Offices; and Exhibit No. 5 showed the same information as to cases handled by Police Departments.

law enforcement officials that one of the most effective methods of controlling bookmaking would be to curtail, or prohibit completely, if possible, the use, by bookmakers, of telephone and telegraph facilities.

Other testimony was presented at the hearing indicating, in some detail, the methods used by bookmakers in carrying on their business. It was developed that, while there is legalized pari mutuel betting at the race tracks in California, the operators and proprietors of these licensed tracks are not favorable to illegal bookmaking operations. They take the view that off-track bookmakers constitute "parasites" and are undesirable. Accordingly, it is the general practice at race tracks in California to prohibit any activities which would further illegal bookmaking. To this end all of the public telephones at the race tracks are locked approximately a half hour before the starting time of each race. In addition, any special activity which has for its purpose the gathering and disseminating of racing information, other than that gathered and disseminated by the regular newsgathering agencies, is prohibited. Only the authorized press services and newspapers have access to the track press boxes. The so-called specialized racing information services are barred. [57]

The testimony indicated that there has developed in the United States special racing news-gathering services. Among these are the Continental Press Service and the Pioneer News Service. According

to the testimony, the Continental Press Service consists of a wire service which is leased from the Western Union and which has outlets at various cities throughout the United States; specifically, this press service has the following drops in California:

Name of Subscriber	Address	Date Service Started
Tejon News	1911 Edison Highway Bakersfield	5-12-45
Consolidated Pub- lishing Co.	615 N. La Brea Ave., Los Angeles	5-12-45
Los Angeles Journalist	208 W. 8th St. Los Angeles	5-12-45
George Zouganiles	181 Andreas Rd., Palm Springs	9- 3-46 .
Arrowhead News	362 D Street San Bernardino	8-12-46
Colton News	211 Platt St. San Bernardino	8-12-46
Southwest News	919 4th Avenue San Diego	11- 5-45
Krelling & Cohen	333 Montgomery St. San Francisco	5-12-45

This press service is a Morse wire and the drops consist of both sending and receiving telegraph sets.

The Pioneer News, having headquarters at 333 Montgomery Street, San Francisco, California, is a service consisting of a wire leased from Western Union, over which is operated teleprinter or ticker sets. These teleprinters are the same instruments as are used in reporting stock-market news and are

located at various drops in California; specifically, these locations are: [58]

Name	Address	Date Service Started	Date Temp. Discon.
Roy Simon	1910 Tuolumne St. Fresno	6-22-46	2-19-48
J. Bozeman	326 Virginia St. Vallejo	5-25-46	1-29-48
W. Musso	215 Georgia St. Vallejo	5-25-46	1-29-48
J. Farrell	216 Georgia St. Vallejo	5-25-46	1-23-48
Mint Smoke Shop	237 Georgia St. Vallejo	8-14-47	1-29-48
Del Kennedy	1160 Old Country Rd. Belmont	10- 8-45	2-19-48
M. Magee	1617 Old Country Rd. Belmont	7-19-47	2-19-48
C. Atkin	145 Montgomery St. San Francisco	10- 8-45	2-19-48
Pioneer News	127 Montgomery St. San Francisco	1-30-46	2-19-48
F. Masonie	145 Mason St. San Francisco	3- 4-46	2-19-48
101 Service Station	Bayshore Highway Bayshore	1-31-47	4-16-48
Andy's Service	2637 Bayshore Highway Bayshore	8-16-47	1-30-48
Geneva Club	3201 Geneva Ave. Bayshore	11-17-47	2-19-48

It will be noted from an analysis of the above table that most of the drops of the Pioneer News Service were temporarily disconnected after the commencement of these hearings on February 18, 1948.

While the technical equipment of these two wire services, the Continental Press and the Pioneer News, are different in that one uses telegraph keys and the other uses teleprinters, still, in other respects, the basic method of operation is similar. In-

formation as to this method of operation was produced at the hearing. Since the Continental Press and the Pioneer News are among those services which are barred from the race tracks, they use various unorthodox methods to obtain information. The most common of these [59] methods, according to the testimony, is to use "signalers" or "wigwaggers", individuals who attend the races at the track and, by a system of signals, relay information to confederates outside who, in turn, send the information to the wire services.

Exhibits Nos. 33 to 37, introduced in evidence, consist of photographs showing a phone installation and a telescope in a house within view of the Santa Anita Race Track. The equipment shown in the photographs was used by one Ed Coplansky who, apparently, employed a telescope to observe signals from wigwaggers within the track. The information so obtained was telephoned to a drop of one of the wire services. The phone used by Coplansky was one which illegally had been tapped into the phone line of the owner of a nearby house.

The apparent reason these specialized wire services go to such extremes to obtain information is that special information is needed by their clients in order to conduct successful bookmaking activities. According to the testimony the information sent out over the regular news services and published in the regular newspapers, and even the detailed description of the running of races given over the radio, do not supply sufficient details to

permit successful bookmaking. A bookmaker needs the following information: (1) direct race odds and fluctuations in these odds; (2) the post time; (3) the exact off time within a matter of seconds; (4) a brief description of the race; (5) results of the race; (6) prices paid. In addition, a bookmaker needs information as to last-minute jockey changes and track conditions. These details are only furnished by the special racing wire service agencies.

As previously indicated, this detailed information is obtained at the race track by one device or another, then it is phoned to one of the offices of the wire service. At this office the information is placed on the wire and is immediately relayed to all of the drops of that particular wire service. Testimony was presented showing the operation of these drops. As soon as racing information is received it is called over a loud-speaker system. In front of the loud speaker are various phones, with the receivers off the hook, and, apparently, at the other end of these phones, bookmakers are listening for the information. Thus, in a matter of seconds, it is possible to get the information from the track to the bookmakers.

Testimony was presented by various police officers and sheriff's office employees as to visits they had made to these various wire service drops. In each of these places, according to the testimony, there are multiple phone installations. Instances were reported of as many as 26 phones in one room and other testimony presented by the telephone

company showed the subscribers to these various phones. Photostatic copies of the telephone cards listing the names of these subscribers were received in evidence as Exhibits Nos. 38 to 79, inclusive, and 80 to 92, inclusive. A general examination of these cards discloses that, while there were several phones in one place, most of them were listed under various fictitious names, including such terms as secretarial services, process service, research companies, printing companies, welding works, and, also, the names of various individuals.

Apparently, multiple phone installations are a necessary part of the equipment used in disseminating racing information to [61] bookmakers. Testimony was presented indicating that, in some cases, these multiple phone installations result from unauthorized extensions of existing facilities, while in other cases they are made by the telephone companies.

Exhibits Nos. 16 to 27, inclusive, consist of photographs taken by a sergeant of the Los Angeles Police Department, showing the facilities at some of the wire service drops in Los Angeles. In each of these instances equipment consists of an instrument for receiving information over the telegraph wire and several phones for relaying this information to outside subscribers. These outside subscribers pay for this service at rates varying from \$4.00 per month to \$339.24 per month. There is set out

below the rates paid by the eight subscribers to the Continental Press Service previously listed:

Subscriber	Monthly Charge
Tejon News	\$144.40
Consolidated Publishing Company	63.00
Los Angeles Journalist	4.00
George Zouganiles	72.27
Arrowhead News	65.93
Colton News	4.00
Southwest News	197.67
Krelling & Cohen	339.24

Additional testimony was presented by police officers as to raids they had made on various locations within the State of California. At some of these locations, including drops on the previously mentioned wire services, it was found that book-making was being carried on.

Testimony was received from representatives of the Western Union, setting out the manner in which these wire services are furnished. Arrangements for the Morse wire used by Continental Press were made in Cleveland, Ohio, and the charges for that lease [62] are paid at Cleveland. The Pioneer News lease, which started October 8, 1945, was arranged for by Stanley Cohen, and, apparently, the main office of Pioneer News is 333 Montgomery Street, San Francisco, California.

Respondent utilities in this case, so far as they were present at the hearing, indicated that their companies had no desire to furnish service for illegal uses and, almost unanimously, they indicated willingness to remove or refuse service whenever a bona fide law enforcement agency instructed them to do so. However, they further contended that

they were not policemen and it was without the scope of their authority to attempt to specifically police their subscribers in an effort to determine whether or not the facilities were being used for illegal purposes.

Another problem concerns the question as to whether or not a utility may be held liable for damages in an action brought by a subscriber to or applicant for service in those cases where the utility has discontinued or refused to extend service to such subscriber or applicant and, in this connection, it is the position of the utilities that they should not be subjected to any rule which would force upon them such actions for damages. We are well aware of the position of the utilities in this matter. However, it is our view, in the light of the evidence adduced in this matter, that certain lawful steps can be taken by the utilities which will curtail the use of their facilities by bookmakers.

From the foregoing evidence, we find that bookmaking is being conducted throughout the State of California on a large scale and, in order to conduct successful bookmaking, the operators thereof must have information in excess of that which can be obtained through regular news and radio channels. Accordingly, there has grown up a specialized wire service which has for its principal purpose the dissemination of detailed racing information within a matter of minutes after the occurrence of the actual events. This information includes details of the track conditions, betting odds, jockey changes,

and other facts occurring immediately prior to the running of the race, a description of the running of the race and the results thereof. These wire services sell this information to bookmakers who, in turn, use it in conducting their business. We, also, find that successful bookmaking cannot be conducted without access to these wire services or without access to telephone facilities.

We further find that it is in the public interest to require communications utilities to refrain from furnishing or continuing to furnish any telephone or telegraph service that will be or is being used in furthering bookmaking or related illegal activities. The use of communications facilities in furtherance of bookmaking being illegal, it follows that such use is contrary and detrimental to the public interest. Additionally, the evidence shows that, as of January 31, 1948, there were held by the fifteen largest telephone companies operating in this State 241,248 applications for telephone service, that could not be filled because of lack of instruments, facilities and materials. This situation makes it imperative that all communications instrumentalities and facilities be employed in the public interest.

The right of a person to utility services, such as telephone and telegraph, is not an inherent right but is due solely to the fact that the State, in the exercise of its police power, has seen fit, under the provisions of the Public Utilities Act, [64] to require the utility to serve the public without undue

or unreasonable discrimination. It, therefore, must be concluded that the State, having the authority to compel a utility to render service, has the authority to impose conditions under which such service may be furnished or terminated. (See *Partnoy v. Southwestern Bell Telephone Co.*, Missouri Public Service Commission, June 13, 1947, 70 P.U.R. (N. S.) 134.) It is established by statute in this State that a telephone or telegraph company is not required to accept messages which will "instigate or encourage the perpetration of any unlawful act * * *." (Section 638, Penal Code.)

It is the positive duty of a communications utility to exercise vigilance to prevent the unlawful use of its instrumentalities and facilities. Such utility exercises a valuable and extraordinary privilege and, in turn, incurs corresponding obligations to the public. Surely, one of its highest obligations is to exercise vigilance to see that its instrumentalities and facilities are not used in aiding and abetting the commission of crime. We are not so naive as to believe that the operators of wire services, as discussed in this decision, can conduct their business of disseminating racing information without general knowledge as to the activities of their customers. The evidence in this case shows that some of the users of these wire services are engaged in bookmaking. The evidence further discloses instances of multiple telephone installations, which installations are aiding the activities of bookmakers. Therefore, we believe that any such in-

stallations should be scrutinized very carefully by the utilities furnishing the services and that additional installations should not be made without careful inquiry as to the nature of their use. [65]

It is the conclusion of this Commission that communications instrumentalities and facilities should not be furnished to persons who will use them for bookmaking or related illegal purposes; nor should they be furnished where there is strong evidence to indicate that the use will be for such illegal purposes. Neither should the furnishing of such instrumentalities and facilities be continued where reasonable cause exists for believing that such facilities are being so used. There is a duty resting upon communications utilities to refuse installations or to discontinue service when these conditions exist. There is a further duty on the utility to make reasonable inquiry as to the use of facilities and, in particular, this is true where the facilities are being installed in unusual circumstances.

ORDER

The above entitled case having been instituted on the Commission's own motion, public hearings having been held therein, said case now being ready for decision, the Commission being fully advised in the premises and basing its decision upon the evidence of record in this case and upon the findings of fact contained in the foregoing opinion,

It Is Hereby Ordered that any communications utility operating under the jurisdiction of this Commission must refuse to establish service for

any applicant, and it must discontinue and disconnect service to a subscriber, whenever it has reasonable cause to believe that the use made or to be made of the service, or the furnishing of service to the premises of the applicant or subscriber, is prohibited under any law, ordinance, regulation, or other legal requirement, or is being or is to be used as an [66] instrumentality, directly or indirectly, to violate or to aid and abet the violation of the law. A written notice to such utility from any official charged with the enforcement of the law stating that such service is being used or will be used as an instrumentality to violate or to aid and abet the violation of the law is sufficient to constitute such reasonable cause.

It Is Further Ordered that any person aggrieved by any action taken or threatened to be taken pursuant to the provisions of this decision shall have the right to file a complaint with this Commission in accordance with law. This remedy shall be exclusive. Except as specifically provided herein, no action at law or in equity shall accrue against any communications utility because, or as a result of, any matter or thing done or threatened to be done pursuant to the provisions of this decision.

It Is Further Ordered that each contract for communications service, by operation of law, shall be deemed to contain the provisions of this decision, whether or not the same be actually included as a part of the application for such service, and the provisions of said decision shall be deemed in

law to be a part of any application for communications service and the applicant for such service shall be deemed to have consented to the provisions of said decision as a consideration for the furnishing of such service.

The term "person," as used in this decision, shall include a subscriber to communications service, an applicant for such [67] service, a corporation, a company, a co-partnership, an association, a political subdivision, a public officer, a governmental agency, and an individual.

The term "communications utility," as used in this decision, includes a "telephone corporation" and a "telegraph corporation," as those terms are defined in the Public Utilities Act.

The Secretary is hereby directed to serve, by registered mail, a certified copy of this decision upon each communications utility operating under the jurisdiction of this Commission and upon each appearance of record herein.

This decision shall become effective after the expiration of twenty days from and after the date hereof.

Dated at San Francisco, California, this 6th day of April, 1948.

R. E. MITTELSTAEDT,
JUSTUS F. CRAEMER,
IRA H. ROWELL,
HAROLD P. HULS,
KENNETH POTTER,
Commissioners. [68]

EXHIBIT "B"

Tom Scott

District Attorney

COUNTY OF KERN
STATE OF CALIFORNIA

March 4, 1948.

Western Union Telegraph Company,
1605 19th Street,
Bakersfield, Calif.

Gentlemen:

This is to notify you that there is a Western Union Telegraph Company telegraph machine and wire leased by your company, or contracted for by your company, that race horse results are received over this wire by virtue of a telegraph key and the use of some code. That said service is furnished to or contracted by the Tejon Sport News or James Mellow, alias James Monroe, or others whose names are unknown to the undersigned. That said leased or contracted machine and wire of your company is located at 1911 Edison Highway, Kern County California at what is known as the Old Ice House.

You are notified that said telegraph machine and wire is used in the County of Kern to violate Section 337a of the Penal Code of the State of California defining bookmaking and also Section 182 defining conspiracy. This telegraph machine and wire is used to aid, assist, and carry on the business of illegal bookmaking by several known illegal bookmakers in Kern County and by James Mello alias James Monroe, or the person who contracted

for and uses said telegraph machine and wire at said address on Edison Highway. [70]

This is to notify you of the illegal use of said telegraph machine and wire and to request that you immediately discontinue the service and disconnect said telegraph machine and wire at said address.

TOM SCOTT,
District Attorney of
Kern County, Calif.

J. E. LOUSTALOT,
Sheriff of Kern County,
California.

H. V. GRAYSON,
Chief of Police of the
City of Bakersfield. [71]

EXHIBIT "C"

State of California
Department of Justice

OFFICE OF THE ATTORNEY GENERAL

600 State Building
Los Angeles 12

March 31, 1948

Western Union Telegraph Company
722 Market Street
San Francisco, California
Attention: General Manager

Gentlemen:

A survey of the transcript of the proceedings of

February 18, 19, 25 and 26, and of March 10, 1948, before the Public Utilities Commission of the State of California at its hearings pertaining to the illegal use of Western Union wire services and/or telephonic equipment, indicates that you had leased wires to the Continental Press Service, which were and are engaged in furnishing information to book-makers in violation of Section 337a of the Penal Code of the State of California, at the following addresses

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Spring.

(Investigation by this office indicates the true location to be at 179 Andreas Road.)

Room 211, Platt Building, San Bernardino,
362 D Street, San Bernardino,
208 West Eighth Street, Los Angeles,
615 North La Brea, Los Angeles,
919 Fourth Avenue, San Diego. [73]

The transcript of the above mentioned proceedings sets out a provision of the contract as given by you, Western Union, to the Continental Press Service in California, and I quote:

“The undersigned (i.e., Continental Press Service) agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the

service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcement agencies that the service is being supplied contrary to law.”

Pursuant to this quoted portion of your contract, by virtue of the terms and conditions therein contained, you are hereby notified that I, as Attorney General of the State of California, being designated as Chief Law Enforcement Officer of this State by our Constitution, do hereby demand that you immediately discontinue the leasing of any and all equipment to the Continental Press Service in California.

Very truly yours,

/s/ FRED N. HOWSER,
Attorney General of
California.

FNH*md

cc Warren Olney, III, Counsel
Commission on Organized Crime
1204 Balfour Building
San Francisco 4. [74]

United States of America,
Southern District of California,
Central Division,
County of Los Angeles—ss.

J. W Inwood, being by me first duly sworn, deposes and says: that he is Superintendent of The

Western Union Telegraph Company, a corporation, at Los Angeles, the defendant in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true; and that he makes this verification for and on behalf of said corporation.

/s/ J W. INWOOD.

Subscribed and sworn to before me this 4th day of May, 1948.

[Seal] JEAN F. CROWE,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires May 28, 1949.

Received copy of the within this 5th day of May, 1948. ..

CHARLES H. CARR,
Attorney for Plaintiff.

[Endorsed]: Filed May 5, 1948. [75]

At a stated term, to wit: the February Term, A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles

on Wednesday, the 5th day of May in the year of our Lord one thousand nine hundred and forty eight.

Present: The Honorable J. F. T. O'Connor,
District Judge.

[Title of Cause]

This cause coming before the Court at this time for hearing on order to show cause and temporary restraining order heretofore filed on April 22, 1948, and continued to this time for hearing; Chas. H. Carr and Bryant Burton, Esqs., appearing as counsel for the plaintiff, and Oscar Lawler, Esq., appearing as counsel for the defendant; and the said Chas. H. Carr, Esq., having argued in support of the order to show cause directed to the defendant to show cause why a preliminary injunction should not issue enjoining the defendant as therein requested, and the said Oscar Lawler having argued in opposition thereto, and the Court having made a statement, it is now by the Court ordered that the temporary restraining order heretofore issued be vacated and that the request for the preliminary injunction be denied, and that the temporary mandatory order requested by the plaintiff pending the trial of the cause be likewise denied with exception allowed to the plaintiff. [76]

In the District Court of the United States for
the Southern District of California, Central
Division

No. 8158-O'C

EDWARD J. McBRIDE, doing business as Con-
tinental Press Service,

Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH COM-
PANY, a corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW UPON REFUSING TO ISSUE
INTERLOCUTORY INJUNCTION; ORDER
DENYING INJUNCTION AND RESTORA-
TION OF SERVICE; AND ORDER VACAT-
ING THE TEMPORARY RESTRAINING
ORDER AND ORDER DIRECTING RES-
TORATION OF SERVICE HERETOFORE
ISSUED

The court, on the 2nd day of April, 1948, made its order in the above entitled matter, enjoining and restraining The Western Union Telegraph Company, a corporation, defendant above named, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with it, from refusing to furnish plaintiff with interstate Morse wire service between plaintiff and its customer, Consolidated Publishing Company of Los Angeles, California, directing defendant to re-

store such services heretofore discontinued from the date of the service of said order until the further order of the court, and directing the defendant to show cause on the 30th day of April, 1948, at 10 o'clock a.m. why a [77] preliminary injunction should not issue enjoining said defendant from refusing to furnish interstate Morse wire service between plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California, or why temporary mandatory order pending the trial of the cause should not issue directing defendant to restore such services except in accordance with the order of the court.

The court, by consent of the parties, continued the hearing upon said order to show cause from April 30, 1948, at 10 o'clock a.m., until May 5, 1948.

Defendant, responsive to said order to show cause, having filed herein and served upon the plaintiff its verified answer to the complaint and the affidavit of J. W. Inwood, the matter came on regularly to be heard on said May 5, 1948, at 10 o'clock a.m., upon the complaint and the affidavits of Edward J. McBride and Harold V. Belden, filed by plaintiff, and the answer and said affidavit of J. W. Inwood, filed on behalf of defendant, and the court now sets forth its findings of fact and conclusions of law, which constitute the grounds of its action as hereinafter stated, as follows:

I.

Plaintiff is and at all times in the complaint

mentioned was a citizen and resident of the State of Ohio.

II.

Defendant, The Western Union Telegraph Company, is and at all times since prior to the year 1872 has been a corporation organized and existing under the laws of the State of New York for the purpose of maintaining and operating a general public utility, intrastate and interstate telegraph system and business throughout the United States, including the State of California.

III.

Continuously since its organization defendant has maintained and operated and continues to maintain and operate an interstate [78] telegraph system and service throughout the United States, including the State of California, which system has also throughout said time maintained intrastate telegraph service throughout California.

IV.

The amount involved in this controversy exceeds Three Thousand Dollars, exclusive of interest and costs.

V.

Defendant, for lack of information and belief with reference thereto, denies the allegations of Paragraph IV of the complaint as to the nature of plaintiff's business; on the same ground denies the allegations of said paragraph with reference to the transmission of news of sporting events by the use

of a Morse wire furnished by defendant to plaintiff's customers in Florida, New York, Oregon or intermediate states, or into Canada or Mexico; and on the same ground denies the allegation of said paragraph that plaintiff's customers receive or have received sporting or racing news service or any news service by direct or other connection with the main or other interstate, or Morse wire, or any wire belonging to or operated by defendant.

VI.

The telegraph facilities and service furnished by defendant to plaintiff referred to in the complaint were and are known and described as "leased facilities," and have been so furnished as follows, and not otherwise:

(a) On March 31, 1941, and at all times thereafter, Federal Communications Commission Tariff No. 219 governed and controlled and continues to govern and control the operations, service and conduct of defendants in the leasing of its interstate public utility communications facilities and services; throughout said [79] time said Tariff No. 219 (so far as pertinent hereto) has provided and required, and continues to provide and require as follows:

"The Western Union Telegraph Company—Tariff F.C.C. No 219—Original Page 7.

LEASED FACILITIES

"(8) The service: Leased Facility service as covered in this tariff consists of furnishing for the

private use of customers, facilities for transmitting electrical signals between specified points. * * *

“Facilities furnished under this tariff may be employed only for the private use of those companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives and each such office shall transmit and receive its particular communications over the equipment installed therein. Further, such facilities shall not be used either directly or indirectly for the handling of communications for the public or any person, firm or corporation other than those whose offices are connected to the circuits or their affiliated and subsidiary companies and their representatives. * * *

“Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law”;

At all times since March 31, 1941, said Federal Communications [80] Commission Tariff No. 219 and Tariff Sheets Nos. 1399T and 1400T, prescribed by the California Public Utilities Commission, have contained, and still contain, the following identical language governing the public utility

facilities and services furnished to plaintiff by defendant herein referred to:

“In view of the fact that the subscriber has exclusive control of his communications over the facilities furnished him by the Telegraph Company, and of the other uses for which facilities may be furnished him by the Telegraph Company, and because of unavoidableness of errors incident to the services and to the use of such facilities of the Telegraph Company, the services and facilities furnished by the Telegraph Company are subject to the terms, conditions and limitations herein specified and to such particular terms, conditions and limitations as are set out in the schedules applicable to particular services and facilities”;

(b) On or about May 19, 1945, Continental Press Service (being the name under which plaintiff was at the time doing and continues to do business) applied in writing to defendant at defendant's general offices, No. 60 Hudson Street, New York City, New York, that defendant lease to said Continental Press Service telegraph facilities, consisting of a Morse operated private telegraph line from the City of Chicago, Illinois, to the City of Seattle, Washington, by way of Los Angeles and San Francisco, California, and Portland, Oregon, and intermediate cities, with Morse telegraph instruments (known as and called “drops”) connected with said private telegraph line at said terminals and at various points in the several states traversed by said line, including points in California. In said

application plaintiff agreed and stipulated as follows: [81]

“The undersigned requests The Western Union Telegraph Company to furnish, subject to and in accordance with its lawful rates and regulations, the service described (including such modifications therein as may be ordered from time to time), for the established minimum period and thereafter until terminated by written notice from the undersigned, unless earlier terminated by the Company pursuant to its regulations, and agrees to pay for such service according to the Company’s established billing practices. The undersigned agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law. This application shall become binding on both parties when accepted by the Company, such acceptance to be evidenced by the signature of one of its officers hereon, or by the establishment of the service”;

Said application did not state that the facilities and service applied for or any part thereof were to be used for any particular purpose, nor did it state that the facilities or service so applied for

were to be used to supply plaintiff's customers or anyone else with sporting or racing news; on the contrary, said application contained no statement as to the nature or the use intended to be made of telegraphic communications which plaintiff or anyone else intended to transmit by means of said facilities and service; [82]

(c) Defendant accepted said application at its said New York office on or about said 19th day of May, 1945, and pursuant thereto and in accordance with the tariffs, schedules, rules, regulations and orders prescribed by the Federal Communications Commission, leased to plaintiff a private telegraph wire or channel for telegraph communication from Chicago, Illinois, by way of Los Angeles, San Francisco, Portland, Oregon, and intermediate cities in the several states traversed by said wire to Seattle, Washington, with connected wires or channels (commonly called "drops") extending from said private leased wire or channel at various points and places in the states traversed by said line, including the places in California hereinafter mentioned; at the respective terminals of said private wire or channel and at each such drop therefrom, including said drops in California, the facilities and service so leased to plaintiff included a Morse telegraph instrument;

(d) On March 4, 1948, and for a long time prior thereto and continuously thereafter until the discontinuances hereinafter mentioned, drops, including at each drop a Morse telegraph instrument as

a part thereof, were maintained as a part of said leased private telegraph line facilities at each of the following places in California:

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Springs,
Room 211, Platt Building, San Bernardino,
362 D Street, San Bernardino,
208 West Eighth Street, Los Angeles,
615 North La Brea, Los Angeles,
919 Fourth Avenue, San Diego;

(e) Each of said drops was so maintained and operated [83] as that any message initiated thereat could be and was immediately transmitted to all other drops connected with said leased line in the various states traversed by said line, including all of said drops connected with said leased line in California;

(f) Neither the premises at the terminals of said leased line nor at any place where any such telegraph instrument or drop was connected with said leased wire were under any control of defendant; all attendants and employees, including the telegraph operator, at each such drop and at all other places on said leased wire, were at all times employed by, and were under the exclusive control of, plaintiff, and defendant had nothing to do either with the employment or the services of any of such attendants or employees or of anyone engaged in or concerned with the transmission of messages or communications over or by means of said leased

facilities or with any such message or communication;

The telegraph facilities and service leased to plaintiff were, as required by said F.C.C. Tariff 219, for the private use of plaintiff and plaintiff's affiliated subsidiary companies, and plaintiff has at all times had exclusive control of the operation and use of said leased facilities and of all communications and messages transmitted over and by means thereof;

Defendant has never policed, monitored or otherwise supervised or observed the use of said facilities or been acquainted with any communications transmitted by means thereof; defendant has not been informed of any such communication or its contents, or of the use made of said facilities otherwise than by the letters from law enforcement officers of Kern County, California, of March 4, 1948, and from the Attorney General of the State of California of March 31, 1948, and by the proceedings before and decision and [84] order of the California Public Utilities Commission referred to in said letter of the Attorney General, which letters, decision and order are made a part of defendant's answer herein and marked Exhibits A, B and C, and are here referred to for particulars;

Defendant's sole contact with said leased facilities during said lease was and has been for the purpose of keeping the same in working order.

VII.

Defendant did not, on April 2, 1948, or at any

other time or at all, wrongfully, or arbitrarily, or without just cause, discontinue the facilities or service leased by it to plaintiff; on the contrary, the facts as to such discontinuance are as follows, and not otherwise:

At a time prior to February 18, 1948, the California Public Utilities Commission initiated a certain proceeding before said Commission entitled, "Case No. 4930; Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest";

Defendant was notified by said Commission of said proceedings and appeared at the hearings had in the course thereof;

Throughout the pendency of said proceedings Honorable Fred N. Howser was, and still is, the Attorney General and chief law enforcement officer of the State of California, and as such appeared in said proceeding before said Commission;

Also appearing in and represented throughout said proceedings before said Commission were the Chief Investigator of the Special Crime Study Commission on Organized Crime for the State of California, [85] and the State Commission on Organized Crime:

Hearing was had and testimony taken before said Commission in said proceeding on February

18, 19, 25, 26 and March 10, 1948, and said Commission rendered its decision and made its order therein on April 6, 1948. **Said decision and order** are attached to and made a part of defendant's answer herein, marked Exhibit A, and are here referred to for particulars;

During the pendency of said proceeding before said California Utilities Commission, and on March 4, 1948, defendant received at its office at 1605 19th Street, Bakersfield, California, letter signed by Tom Scott, as District Attorney of Kern County, California, by J. E. Loustalot, as Sheriff of said County (said persons being law enforcement officers of Kern County, California), and by H. V. Grayson, as Chief of Police of the City of Bakersfield (said person being law enforcement officer of the City of Bakersfield, in said county) notifying defendant that the latter's telegraph instrument and wire located at 1911 Edison Highway, Bakersfield, Kern County, California (being part of the private telegraph line facilities leased by defendant to plaintiff doing business as Continental Press Service as aforesaid), had been and were on March 4, 1948, being used "to aid, assist and carry on the business of illegal bookmaking by several known illegal bookmakers in Kern County, and by James Mellow, alias James Monroe, or the person who used said telegraph machine or wire at said address on Edison Highway," and to violate sections 182 and 337a of the Penal Code of California;

On March 31, 1948, defendants received from

said Honorable Fred N. Howser, as Attorney General and chief law enforcement officer of California, letter notifying defendant that its facilities and services (being part of the private line telegraph facilities [86] leased by defendant to plaintiff) at the following addresses:

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Springs,
Room 211, Platt Building, San Bernardino,
362 D Street, San Bernardino,
208 West Eighth Street, Los Angeles,
615 North La Brea, Los Angeles,
919 Fourth Avenue, San Diego,

were being used to furnish information to bookmakers in violation of section 337a of the Penal Code of California. In said letter said Attorney General "as chief law enforcement officer of this state" demanded that defendant immediately discontinue the leasing of its facilities and service to plaintiff in California;

Copies of the respective letters from the District Attorney and Sheriff of Kern County and the Chief of Police of Bakersfield, and from said Attorney General to defendant are attached to and made a part of the answer herein and marked Exhibits B and C, respectively. They are here referred to for further particulars;

Immediately following receipt of said letters, defendant informed plaintiff of the receipt thereof and of its intention to comply with the demands therein made;

On April 2, 1948, pursuant to and because of the statements and representations made in said two letters last above referred to, defendant discontinued the facilities and service so leased by it to plaintiff at the places and points specified in said letters and immediately informed plaintiff of such discontinuance;

April 6, 1948, prior to the commencement of this action, said California Public Utilities Commission rendered its decision and made its order in said Case No. 4930, stating, among other things, that from the testimony produced at the hearings in said case it found that the defendant's facilities leased to plaintiff were being [87] used by the Consolidated Publishing Company and other persons for illegal purposes. Said decision and order are attached to and made a part of defendant's answer herein and marked Exhibit A, and are here referred to for further particulars;

Copy of said decision and order was caused by said Commission to be transmitted to and was received by defendant.

VIII.

Defendant is now and at all times has been ready and willing to furnish facilities and services to plaintiff and to all other persons in accordance with the tariffs, rules and regulations of the Federal Communications Commission and of the California Public Utilities Commission in such manner as not, by means of such facilities and service, to violate any law of the United States or of the State of California, or of any other state.

IX.

Defendant has not refused to provide interstate Morse wire or any other of its public utility facilities to plaintiff; on the contrary it is now and at all times has been ready and willing to furnish its public utility facilities and service to plaintiff and to all other persons in accordance with the tariffs, rules and regulations of the Federal Communications Commission and of the California Public Utilities Commission, in such manner, however, as not, by means of such facilities and services, to violate or to aid and abet the violation of any law of the United States or of the State of California, or of any other state.

X.

It is not true that the refusal and failure of defendant to supply plaintiff with interstate Morse wire or other public utility facilities has caused or will cause plaintiff irreparable damage. [88]

XI.

No application has been made by plaintiff to the Federal Communications Commission to change, modify or abolish the provisions of said Commission's Tariff No. 219, set forth in defendant's answer and in the affidavit of J. W. Inwood, or for any relief against defendant by said Commission for or on account of any of the acts complained of in the complaint herein.

XII.

Plaintiff has not applied to the California Public Utilities Commission to change, modify or abolish Tariffs 1399T and 1400T, prescribed by said Com-

mission, or to change, modify or rescind the decision or order of said Commission of April 6, 1948, or for any relief against defendant by said Commission for or on account of any of the acts complained of in the complaint herein.

XIII.

It is not true that plaintiff has no adequate remedy at law; on the contrary, plaintiff has, and at all times has had, the right and privilege of applying to the Federal Communications Commission to change, modify or abolish the provisions of said Tariff No. 219 hereinabove referred to, under and pursuant to which defendant's facilities and service were discontinued as aforesaid, and to compel defendant to render and provide its public utility services to plaintiff in all respects as required by law;

Plaintiff has at all times had the right and privilege of applying to the California Public Utilities Commission to change, modify or abolish said Tariffs 1399T and 1400T and said order of April 6, 1948, if either said tariff or said order is unreasonable or if plaintiff is aggrieved thereby; and to compel defendant to render and provide its public utility intrastate services to plaintiff in all respects as required by law. [89]

XIV.

It is not true that defendant has in any manner or at all prevented plaintiff from receiving any service from defendant either in interstate or foreign communication or otherwise or at all by wire or otherwise at the same charges and upon the

terms and conditions as favorable as the charges, terms and conditions given by defendant for like communication under similar conditions to any other person.

XV.

There is and has been no application by the Attorney General of the United States or request to the Federal Communications Commission for the filing of this or any other action, nor is there any allegation by either said Attorney General or said Commission of failure by defendant to comply with, or that defendant has violated any of the provisions of Chapter 5, Subchapter IV, sections 401 and 406, Title 47, of the United States Code, and this action was commenced and is being maintained without any such application or request. [90]

Upon the foregoing findings of fact, the court states its conclusions of law as follows:

1. The telegraph system of The Western Union Telegraph Company, a telegraph corporation, is, and at all the times mentioned in the complaint has been subject to the plenary control and regulation of the Federal Communications Commission as to its interstate operations, business and service, and subject to like plenary control and regulation of the California Public Utilities Commission as to its intrastate operations, business and service in the State of California;

2. At all of the times mentioned in the complaint, Federal Communications Commission Tariff No. 219 has reserved and continues to reserve to defendant the right to discontinue its service to any

drop or connection or to all drops and connections whenever defendant receives notice from federal or state law enforcing agencies that such service is being supplied contrary to law;

3. At all of the times mentioned in the complaint it was agreed by plaintiff that the facilities leased to him by defendant would not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of the State of California, and that defendant is at liberty to discontinue the service to any drop or connection or to all drops and connections so leased, on receipt by defendant from federal or state law enforcing agencies of notice that the facilities so leased are being used contrary to law. Said agreement is still in force and effect;

4. On March 4 and March 31, 1948, and on April 6, 1948, defendant received notices from the law enforcing agencies of the State of California, to-wit, the District Attorney and Sheriff of Kern County and the Chief of Police of Bakersfield, California, the [91] Attorney General and the Public Utilities Commission of said State, that the "drops" or connections and services included in defendant's lease to plaintiff at the following addresses:

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Springs,
Room 211, Platt Building, San Bernardino,
362 D Street, San Bernardino,

208 West Eighth Street, Los Angeles,
615 North La Brea, Los Angeles,
919 Fourth Avenue, San Diego,

were being used to violate and to aid and abet in the violation of the laws of the State of California;

5. Discontinuance by defendant of its facilities and services complained of herein was by reason of said notices from said law enforcing agencies and pursuant to and in accordance with the provisions of Federal Communications Commission Tariff No. 219, and the agreement between plaintiff and defendant, and was lawful;

6. Plaintiff has not applied to either the Federal Communications Commission or to the California Public Utilities Commission for any action or relief by either of said Commissions against defendant for or on account of any of the matters alleged in the complaint herein;

7. No application of the Attorney General of the United States, either at the request of the Federal Communications Commission or otherwise has been made herein to this court or otherwise or at all, alleging any failure of defendant to comply with any provision of Chapter 5, Title 47 of the United States Code;

8. This action was not commenced nor is it being maintained upon the relation of any person alleging any violation by [92] defendant of any

provision of said Chapter 5, Title 47 of the United States Code which prevents any such relator from receiving defendant's service in interstate or foreign communication by wire at the same charges or upon terms and conditions as favorable as those given by defendant for like communication or transmission under similar conditions to any other person;

9. Plaintiff is not entitled to preliminary injunction herein;

10. Plaintiff is not entitled to mandatory or any order that said leased facilities and service be restored;

11. Plaintiff is not entitled to have the temporary restraining order heretofore issued continued in force;

12. Plaintiff is not entitled to maintain this action. [93]

It Is, Therefore, Ordered:

That the temporary restraining order and the order directing restoration of service heretofore issued be and the same are hereby vacated and set aside;

That the request for preliminary injunction be and the same is hereby denied;

That the request for temporary or other mandatory order directing restoration of defendant's fa-

cilities and service pending the further order of the court be and the same is hereby denied.

Exception is allowed to plaintiff.

May 24, 1948.

/s/ J. E. F. O'CONNOR,
District Judge.

Dated: May 21st, 1948. 2:40 p.m.

The foregoing findings, conclusions of law, and order are approved as to form.

/s/ CHARLES H. CARR,
Attorney for Plaintiff.
By F. A. E. BLOCK.

Judgment entered May 24, 1948. Docketed May 24, 1948. J Book 50, Page 766.

EDMUND L. SMITH,
Clerk.

By /s/ J. MASON,
Deputy.

[Endorsed]: Filed June 3, 1948. [94]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Edward J. McBride, doing business as Continental Press Service, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order denying the request for a preliminary in-

junction and for a mandatory order directing restoration of defendant's interstate Morse wire service between plaintiff and the Consolidated Publishing Company of Los Angeles, California.

Entered in this action on the 24th day of May, 1948.

/s/ CHARLES H. CARR,
Attorney for Appellant.

[Endorsed]: Filed June 3, 1948. [95]

[Title of District Court and Cause.]

DESIGNATION OF PARTS OF THE RECORD
NECESSARY FOR CONSIDERATION OF
POINTS ON WHICH APPELLANT IN-
TENDS TO RELY ON THE APPEAL

Appellant, Edward J. McBride, doing business as Continental Press Service, herewith designates the parts of the record which he thinks necessary for the consideration of the points on which he intends to rely on this appeal, namely:

1. Complaint.
2. Affidavit of Edward J. McBride in support of Complaint.
3. Affidavit of Harold V. Belden in support of Complaint.
4. Answer.
5. Order to Show Cause and Temporary Restraining Order of April 22, 1948. (Do not print Points and Authorities in support of Order to Show Cause.)

6. Affidavit of J. W. Inwood responsive to Order to [96] Show Cause and Temporary Restraining Order.

7. Minute Order of May 5, 1948—denying Preliminary Injunction and Mandatory Relief.

8. Findings of Fact and Conclusions of Law, Order denying Interlocutory Injunction and vacating Temporary Restraining Order and the Order Directing Restoration of Services—May 24, 1948.

9. Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit.

10. Statement of Points on which Appellant Intends to Rely on Appeal.

11. Designation of Parts of the Record necessary for Consideration of Points on which Appellant Intends to Rely on the Appeal.

/s/ CHARLES H. CARR,
Attorney for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 15, 1948. [97]

In the District Court of the United States,
Southern District of California,
Central Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 98, inclusive, contain

full, true and correct copies of Complaint; Affidavits of Harold V. Belden and Edward J. McBride; Order to Show Cause and Temporary Restraining Order; Affidavit of J. W. Inwood; Answer; Minute Order Entered May 5, 1948; Findings of Fact and Conclusions of Law upon Refusing to Issue Interlocutory Injunction; Order Denying Injunction and Restoration of Service and Order Vacating the Temporary Restraining Order and Order Directing Restoration of Service heretofore issued; Notice of Appeal and Designation of Record on Appeal which constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$25.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 7th day of July, A. D. 1948.

(Seal) EDMUND L. SMITH,
Clerk.

By /s/ Theodore Hocke,
Chief Deputy.

[Endorsed]: No. 11969. United States Circuit Court of Appeals for the Ninth Circuit. Edward J. McBride, doing business as Continental Press Service, Appellant, vs. The Western Union Telegraph Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed July 8, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11969

EDWARD J. McBRIDE, doing business
as CONTINENTAL PRESS SERVICE,
Appellant,

vs.

THE WESTERN UNION TELEGRAPH
COMPANY, a corporation,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY
ON APPEAL

Appellant, Edward J. McBride, doing business
as Continental Press Service, herewith sets forth

a concise statement of the points on which he intends to rely on this appeal, viz.:

I.

The District Court erred in denying plaintiff's request for a preliminary injunction.

II.

The District Court erred in denying plaintiff mandatory relief prayed for in the Complaint.

III.

The findings of fact made by the District Court are inconsistent with and are not supported by the pleadings and record in the case.

IV.

The District Court erred in holding that plaintiff was not entitled to maintain this action.

/s/ CHARLES H. CARR,
Attorney for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed July 14, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF THE RECORD
NECESSARY FOR CONSIDERATION OF
POINTS ON WHICH APPELLANT IN-
TENDS TO RELY ON THE APPEAL

Appellant, Edward J. McBride, doing business as Continental Press Service, herewith designates the parts of the record which he thinks necessary for the consideration of the points on which he intends to rely on this appeal, namely:

I.

The entire transcript as certified to you by the Clerk of the District Court.

II.

Statement of points on which appellant intends to rely on appeal filed with the Clerk of this Court.

III.

Designation of parts of the record necessary for consideration of points on which appellant intends to rely on the appeal filed with the Clerk of this Court.

/s/ CHARLES H. CARR,
Attorney for Appellant.

(Affidavit of Service by Mail, attached.)

[Endorsed]: Filed July 14, 1948. Paul P. O'Brien, Clerk.

No. 11969

IN THE
**United States Court of Appeals
For the Ninth Circuit**

EDWARD J. McBRIDE, doing business as Con-
tinental Press Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COM-
PANY, a corporation,

Appellee.

Appeal from the United States District Court
for the Southern District of California
Central Division

PROCEEDINGS HAD IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, November 8, 1948.

Before: Denman, Chief Judge, and Healy and Orr,
Circuit Judges.

ORDER OF SUBMISSION

Ordered appeal herein, argued by Mr. Charles H. Carr, counsel for appellant, and by Mr. Oscar Lawler, counsel for appellee, and by Mr. Everett McKeage, counsel for Amicus Curiae, The People of the State of California and The Public Utilities Commission of said State, and submitted to the court for consideration and decision.

In the United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, December 1, 1948.

Before: Denman, Chief Judge, and Healy and Orr,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Upon Appeal from the District Court of the United
States for the Southern District of California,
Central Division.

Before: Denman, Chief Judge, and Healy and Orr,
Circuit Judges.

Denman, Chief Judge:

OPINION

McBride appeals from a judgment of the district court in a case in which McBride seeks to "compel the restoration to him" by the Telegraph Company of the telegraph wire service to transmit race track news between cities in eastern states and California cities and the use of Morse telegraph instruments, called drops, in the latter cities, which telegraphically receive such news. The complaint alleges these services had been theretofore supplied McBride but had been discontinued by the Telegraph Company, and that he cannot transmit such news "over interstate Morse wire facilities unless Defendant is compelled or required by order of this Court to continue to supply Plaintiff with such facilities."

The court (a) held that it had no jurisdiction of the person of McBride; and

(b) Though so determining the court's absence of jurisdiction, found on the evidence that the telegraph company was justified in not renewing the service and held that McBride is "not entitled to mandatory or any order that said leased facilities and services be restored" and ordered that a temporary restraining order be vacated and that McBride's "request for a preliminary injunction be and the same is hereby denied."

We are of the opinion that the court erred in holding that it had no jurisdiction over the person of McBride, but should be sustained on the evidence adduced in its holding that McBride is not entitled to a mandatory or any order that the telegraphic facilities and services be restored, and in its order that preliminary injunction be denied.

A. *Jurisdiction in personam.*

McBride claims he is entitled to maintain his action under 47 U.S.C., Sec. 406, providing:

"The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said car-

rier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ.”

The district court held that the action, in effect for a writ of mandamus, should have been brought by someone other than McBride, apparently the Attorney General, for him as “relator.”

F.R.C.P. Rule 81(b) has abolished writs of mandamus and substituted a motion or complaint. We think that, assuming that when Sec. 406 was passed the “relator” should have entitled his action as U. S. ex rel., etc., or the Attorney General ex rel., etc., Rule 81(b) now has substituted the simpler process and made unnecessary the mere formality of pleading in the relator form.

B. The telegraph company is justified in refusing to restore the discontinued service of race track news.

The telegraph company based its refusal to restore the service on Federal Communication Commission’s Tariff Regulation 219(8) *infra*.

McBride’s brief disavows any contention that this regulation is unreasonable and at the hearing stated that for the purposes of this litigation it is, as claimed by the telegraph company, to be deemed valid. As his brief states it, “the issue is not the reasonableness of Tariff Regulation No. 219 but whether

appellant can compel *restoration* of service improperly denied him.”* (Emphasis supplied.)

So far as this case concerns this regulation, we are not presented with the question of constitutional right considered in such a case as *New State Ice Co. v. Liebman*, 285 U.S. 262, where, at page 268, the court determined the lack of constitutionality of “a regulation which has the effect of denying or *unreasonably* curtailing the common right to engage in a lawful private business.” (Emphasis supplied.)

Regulation 219, in paragraph (8), provides:

“Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that *the service is being supplied contrary to law.*” (Emphasis supplied.)

The important factor in the regulation is that it is the “*service*” being supplied by the telegraph com-

* Hence there is no merit to the contention of the telegraph company that McBride’s relief is confined to a resort to the Communication Commission under those cases holding that where the claim is that the “regulation in question is unlawful because unreasonable * * * the objection must be addressed to the commission and not as original matter brought to the court.” *Ambassador, Inc. v. United States* (1945), 325 U.S. 317, 324; *Baltimore & Ohio R.R. Co. v. Pitcairn Coal Co.* (1910), 215 U.S. 481, 492-4.

pany over its wires through any drop which it may discontinue on receiving notice that it is violating the law. It is not necessary that there be a guilty participating of the sender or intermediate transmitter of the messages to the drop. The guilty use of the drop in receiving the messages is enough to show an illegal use of the wires' service.

Bookmaking of race track bets is illegal under Section 337(a) and Section 182 of the California Penal Code. McBride's racing news from the race tracks or other states was sold to a California corporation, Consolidated Publishing Co. of Los Angeles. Through the latter's direction, the out of state race track news was received through the drops in various places in California. McBride claims that the transmission of such news is a legitimate business under a California decision, *The People v. Brophy*, 49 Cal. App. (2) 15.

For the purposes of this appeal we assume that, so far as concerns McBride, he was engaged in a legitimate business in sending the race track news *from* the eastern tracks, and that Consolidated Publishing Company in its participancy in its transmission committed no wrongful act. Such facts are not relevant to the contention here that the restoration of the service was properly denied by the telegraph company because it was advised by California law enforcement officers that the recipients of the news were bookmakers using the receiving drops in making racing bets, thus causing the telegraph company to supply service violating the California law.

The telegraph company was notified by the Attorney General for California in writing that such illegitimate use of the drops was being made in several cities in California and by the Sheriff of Kern County, California, that such use was being made in the city of Bakersfield, California. McBride does not complain that the places of such illegal misuse are not sufficiently described, but that the statement of the notices of illegal use are not substantiated. We do not agree that the notifying officers are required to supply to the telegraph company the probative facts to be adduced in court in the trial of the cases of violation stated in the notices.

McBride's complaint contained two causes of action. We can see no essential difference between them. In both he states that the telegraph company should be "required by order of the court *to continue* to supply plaintiff with such facilities." (Emphasis supplied.) He contends, however, that his second cause of action requires the telegraph company to disregard the notices of the law enforcement officers because they concern a past wrongdoing and treat it as beginning *de novo* a litigation for the supplying of the telegraphic and drop services which the company refuses him.

The effect of such a construction would make nugatory the provisions of Section 219(8). A new illegal use would follow to be stopped only long enough for the bringing of another such suit as here. The process of law violation would continue indefinitely with only minor stoppages by a impotent At-

torney General. The telegraph company may rely on the Attorney General's and the county sheriff's notices as sufficient to justify the telegraph company's refusal to restore the services, which, as both complaints describe it, would be a continuing of past services.

The order denying the preliminary injunction is affirmed.

[Endorsed]: Opinion. Filed December 1, 1948. As amended by order of January 5, 1949. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 11969

EDWARD J. McBRIDE, etc.,

Appellant,

vs.

WESTERN UNION TELEGRAPH CO.,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause denying the preliminary injunction be, and hereby is affirmed.

[Endorsed]: Judgment. Filed and entered Dec. 1, 1948. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceeding of Wednesday, January
5, 1949.

Before: Denman, Chief Judge, and Healy and Orr,
Circuit Judges.

ORDER DIRECTING MODIFICATION OF
OPINION AND DENYING PETITION
FOR REHEARING

Ordered that the opinion of this court heretofore rendered and filed be amended pursuant to the type-written order this day filed.

Upon consideration of the petition of appellant, filed December 30, 1948, and within time allowed therefor by rule of court for a rehearing of above cause, and of the Brief of Amicus Curiae filed January 5, 1949, in support of such petition for rehearing, and by direction of the Court, It Is Ordered that such petition for rehearing be, and hereby is denied.

In the United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF
APPEALS FOR THE NINTH CIRCUIT, TO
RECORD CERTIFIED UNDER RULE 38 OF
THE REVISED RULES OF THE SUPREME
COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and fourteen (114) pages, numbered from and including 1 to and including 114, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of January, 1949.

[Seal]

PAUL P. O'BRIEN,
Clerk.

No. 11969

United States
Circuit Court of Appeals
for the Ninth Circuit

EDWARD J. McBRIDE, doing business as Continental Press Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

Typo Press, 398 Pacific, San Francisco

FILED

AUG 3 - 1948

PAUL R. O'BRIEN,

No. 11969

United States
Circuit Court of Appeals
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Appellant;

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and
for the Southern District of California, Central
Division

No. 8158—O'C

EDWARD J. McBRIDE, doing business
as CONTINENTAL PRESS SERVICE,
Plaintiff.

vs.

THE WESTERN UNION TELEGRAPH
COMPANY, a corporation,
Defendant.

COMPLAINT

Comes now the Plaintiff and complains of the
Defendant, and for first cause of action alleges:

I.

Plaintiff is, and at all times hereinafter mentioned was, a citizen and a resident of the State of Ohio.

II.

Defendant, The Western Union Telegraph Company, is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of New York, engaged in business within the County of Los Angeles, State of California, and a common carrier for hire, engaged in interstate and foreign communication by wire within the terms of the Federal Communications Act of 1934 as amended. [2]

III.

The jurisdiction of this Court is based upon the fact that Plaintiff is a citizen of the State of Ohio, and Defendant, The Western Union Telegraph Company, is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of New York, engaged in business within the County of Los Angeles, State of California; and the amount involved in this controversy exceeds \$3,000.00, exclusive of interest and costs [Title 28 U.S.C.A., Section 41(1)].

IV.

At all times herein mentioned, Plaintiff was, and now is, an individual doing business under the fictitious name and style of The Continental Press Service with principal offices located in Cleveland, Ohio, and other offices located in Chicago, Illinois and New York, New York. Plaintiff is engaged in the business of disseminating information of sporting events, including racing news, over the interstate and foreign communication wires and facilities of Defendant to its customers located throughout the United States, and in Canada and Mexico. Such news of sporting events is transmitted to Plaintiff's customers in interstate commerce by use of a Morse wire furnished by Defendant which traverses the United States, extending to Florida, New York, Oregon, California and intermediate states, and reaching into Canada and Mexico. Each of Plaintiff's customers receives its sporting and racing news service by direct con-

nection with the main interstate Morse wire, and each message is simultaneously transmitted from Plaintiff to all of its customers located in the various states throughout the United States, and in Canada and Mexico.

V.

Prior to April 2, 1948, Plaintiff applied to Defendant for, and has been supplied with, interstate Morse [3] wire facilities to be used to supply Plaintiff's customers with news, including sporting and racing news. Such wire facilities included a direct connection from the main line to each customer. Plaintiff paid Defendant for such service, and is willing to continue to pay for such service according to the established rates and billing practices of Defendant. Prior to April 2, 1948, Plaintiff was using the wire facilities supplied by Defendant to transmit its news to each of its customers connected with the interstate wire facilities, including Consolidated Publishing Company of Los Angeles, California, and that company was receiving and paying Plaintiff Five Hundred Dollars per week for the news supplied by Plaintiff over the interstate Morse wire facilities of Defendant. Plaintiff has heretofore relied upon and still does rely upon the Defendant, The Western Union Telegraph Company, for interstate Morse wire facilities to supply its customers with news, including its customer, Consolidated Publishing Company of Los Angeles, California.

VI.

On April 2, 1948, Defendant wrongfully and

without just cause discontinued Plaintiff's interstate Morse wire facilities by which Plaintiff was supplying news to its customers in the State of California, including its customer, Consolidated Publishing Company of Los Angeles, California. Plaintiff's customer, Consolidated Publishing Company of Los Angeles, California, still desires to purchase Plaintiff's news service over the interstate Morse wire facilities, and has so advised Plaintiff. Consolidated Publishing Company was paying Plaintiff Five Hundred Dollars per week for Plaintiff's news service, and the arbitrary discontinuance by Defendant of the facilities described herein, prevents Plaintiff from continuing to sell its service to Consolidated Publishing Company. [4]

VII.

The Consolidated Publishing Company is a partnership engaged in the business of disseminating general news and sporting news, principally racing news, by means of daily and weekly publications generally referred to as scratch sheets, which are sold to the public at news stands, in drug stores, and in other similar establishments throughout the Los Angeles area where newspapers and magazines are customarily sold.

VIII.

Plaintiff has heretofore applied for, and has been supplied with, such interstate Morse wire facilities by Defendant with connections for each of Plaintiff's customers pursuant to said applications

for service. The Morse wire facilities, with connections for each of Plaintiff's customers, have been in service and used by Plaintiff to transmit to said customers news, including sporting and racing news, up to and including April 2, 1948, when Defendant, without just cause, discontinued the interstate Morse wire facilities used by Plaintiff to transmit news to Consolidated Publishing Company.

IX.

Defendant is required by law to supply Plaintiff with interstate Morse wire facilities of the type and kind hereinbefore referred to. Plaintiff cannot transmit its news to the Consolidated Publishing Company over interstate Morse wire facilities unless Defendant is compelled or required by order of this Court to continue to supply Plaintiff with such facilities. Defendant has refused to provide such service to Plaintiff. The refusal and [5] failure of The Western Union Telegraph Company to supply Plaintiff this service, has caused, and will cause, Plaintiff irreparable damage for which Plaintiff has no adequate remedy at law.

X.

The Defendant, The Western Union Telegraph Company, has been, and is, able and has the capacity of rendering the facilities herein prayed for and which were rendered Plaintiff prior to April 2, 1948, on which date Defendant arbitrarily and without proper cause, interrupted and discontinued

such interstate Morse wire service by Plaintiff to Consolidated Publishing Company.

For a Second and Separate Cause of Action, Plaintiff alleges:

I.

Plaintiff refers to Paragraph I of the first cause of action and makes the same a part hereof as if fully set forth herein.

II.

Plaintiff refers to Paragraph II of the first cause of action and makes the same a part hereof as if fully set forth herein.

III.

This action arises and the Court has jurisdiction under Section 406 of the Communications Act of 1934, as amended (48 Stat. 1095; U.S.C., Title 47, Section 406), to compel the Defendant, The Western Union Telegraph Company, a common carrier for hire, engaged in furnishing interstate and foreign communication by wire, to restore transmission service in interstate and foreign communication to Plaintiff upon the same terms and conditions as those given by said Defendant for like communication facilities to any other party or person. [6]

IV.

At all times herein mentioned, Plaintiff was, and now is, an individual doing business under the

fictitious name and style of the Continental Press Service with principal offices located in Cleveland, Ohio, and other offices located in Chicago, Illinois and New York, New York. Plaintiff is engaged in the business of disseminating information of sporting events, including racing news, over the interstate and foreign communication wires and facilities of Defendant to its customers located throughout the United States, and in Canada and Mexico. Such news of sporting events is transmitted to Plaintiff's customers in interstate commerce by use of a Morse wire furnished by Defendant which traverses the United States, extending to Florida, New York, Oregon, California and intermediate states, and reaching into Canada and Mexico. Each of Plaintiff's customers receives its sporting and racing news service by direct connection with the main interstate Morse wire, and each message is simultaneously transmitted from Plaintiff to all of its customers located in the various states throughout the United States, and in Canada and Mexico.

V.

Prior to April 2, 1948, Plaintiff applied to Defendant for, and had been supplied with, interstate Morse wire facilities to be used to supply Plaintiff's customers with news, including sporting and racing news. Such wire facilities included a direct connection from the main line to each customer. Plaintiff paid Defendant for such service, and is willing to continue to pay for such service accord-

ing to the established rates and billing practices of Defendant. Prior to April 2, 1948, Plaintiff was using the wire facilities supplied by Defendant to transmit its news to each of its customers connected with the interstate wire facilities, including Consolidated Publishing [7] Company of Los Angeles, California, and that company was receiving and paying Plaintiff Five Hundred Dollars per week for the news supplied by Plaintiff over the interstate Morse wire facilities of Defendant. Plaintiff has heretofore relied upon and still does rely upon the Defendant, The Western Union Telegraph Company, for interstate Morse wire facilities to supply its customers with news, including its customer, Consolidated Publishing Company of Los Angeles, California.

VI.

On April 2, 1948, Defendant wrongfully and without just cause discontinued Plaintiff's interstate Morse wire facilities by which Plaintiff was supplying news to its customers in the State of California, including its customer, Consolidated Publishing Company of Los Angeles, California. Plaintiff's customer, Consolidated Publishing Company of Los Angeles, California, still desires to purchase Plaintiff's news service over the interstate Morse wire facilities, and has so advised Plaintiff. Consolidated Publishing Company was paying Plaintiff Five Hundred Dollars per week for Plaintiff's news service, and the arbitrary discontinuance by Defendant of the facilities de-

scribed herein, prevents Plaintiff from continuing to sell its service to Consolidated Publishing Company.

VII.

The Consolidated Publishing Company is a partnership engaged in the business of disseminating general news and sporting news, principally racing news, by means of daily and weekly publications generally referred to as scratch sheets, which are sold to the public at news stands, in drug stores, and in other similar establishments throughout the Los Angeles area where newspapers and magazines are customarily sold. [8]

VIII.

Plaintiff has heretofore applied for, and has been supplied with, such interstate Morse wire facilities by Defendant with connections for each of Plaintiff's customers pursuant to said applications for service. The Morse wire facilities, with connections for each of Plaintiff's customers, have been in service and used by Plaintiff to transmit to said customers news, including sporting and racing news, up to and including April 2, 1948, when Defendant, without just cause, discontinued the interstate Morse wire facilities used by Plaintiff to transmit news to Consolidated Publishing Company.

IX.

Defendant is required by law to supply Plaintiff

with interstate Morse wire facilities of the type and kind hereinbefore referred to. Plaintiff can not transmit its news to the Consolidated Publishing Company over interstate Morse wire facilities unless Defendant is compelled or required by order of this Court to continue to supply Plaintiff with such facilities. Defendant has refused to provide such service to Plaintiff.

X.

The Defendant, The Western Union Telegraph Company, has been, and is, able and has the capacity of rendering the facilities herein prayed for and which were rendered Plaintiff prior to April 2, 1948, on which date Defendant arbitrarily and without proper cause, interrupted and discontinued such interstate Morse wire service by Plaintiff to Consolidated Publishing Company. [9]

Wherefore, Plaintiff prays in his first cause of action:

1. That Defendant, his agents, solicitors and employees, and each of them, be perpetually restrained and enjoined from refusing to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California;

2. That this Court issue a preliminary injunction enjoining Defendant from refusing to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California, until the entry of final judgment herein;

3. That this Court issue a temporary restraining order enjoining Defendant from refusing to furnish said service as hereinbefore described until a hearing may be had on the prayer for a preliminary injunction hereinabove prayed for, and Plaintiff prays that such order issue without notice to prevent further irreparable injury to Plaintiff's business as heretofore described;

Plaintiff prays respecting his second cause of action:

1. That this Court issue a permanent mandatory order compelling Defendant to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California;

2. That this Court issue a temporary mandatory order without notice compelling Defendant to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California, pending the hearing on the permanent mandatory order prayed for above; [10]

And Plaintiff further prays for his costs incurred herein; and for such other and further relief as this Court may deem just and proper.

/s/ CHARLES H. CARR,
Attorney for Plaintiff.

(Verified.)

[Endorsed]: Filed April 22, 1948. [11]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Harold V. Belden, being first duly sworn, deposes and says:

That the Consolidated Publishing Company, hereinafter referred to as “Consolidated,” is a partnership composed of Edward J. Maloney, Harold V. Belden and Russell Brophy, all residents of the County of Los Angeles, State of California, doing business under the fictitious name and style of Consolidated Publishing Company at 615 North La Brea Avenue, Los Angeles, California.

Consolidated is engaged in the business of disseminating sporting news, principally racing news, by means of daily and weekly publications which it prints in its own plant located at the above address. Consolidated prints and publishes the following [12] daily racing news sheets commonly referred to as “scratch sheets”: Metropolitan Scratch Sheet, Reporter Scratch Sheet and Blue Sheet. A morning and an afternoon edition is printed each day except Sunday of the Metropolitan Scratch Sheet and Reporter Scratch Sheet. Its Blue Sheet is printed once daily except Sunday. Each week Consolidated sells approximately 100,000 daily scratch sheets. In addition, Consolidated publishes two weekly sporting papers, the Reporter Weekly and

the Hollywood Observer, which are issued on Friday and have a circulation of 2,800 copies per week.

Consolidated conducts its operations at the address above mentioned and at such place maintains both its offices and printing presses. The real estate is under lease and has an additional two years to run. The printing presses and other equipment owned by Consolidated and used to conduct its business are presently valued at approximately \$100,000.

Consolidated publishes and distributes its scratch sheets six days a week, fifty-two weeks each year, Sundays being excepted. It has approximately sixty-five employees and maintains the usual business offices where its books and records are kept for the purpose of reflecting its social-security program, unemployment insurance, withholding taxes, State and Federal income taxes, city license taxes and various other data necessary to the usual conduct of a business.

Other incidents of Consolidated's business are its union contracts which obligate the company to provide severance and accumulated vacation pay upon termination of employment.

Consolidated's daily and weekly sports publications are sold throughout the State of California, and also in the State of Nevada. The Metropolitan Scratch Sheet is admitted to second-class mailing privileges. The scratch sheets are distributed in Los Angeles by means of route men in a manner

similar to that employed by metropolitan newspapers. [13]

The method of distribution is substantially as follows: Each day a route carrier calls upon a newsstand operator and delivers the number of scratch sheets requested by the news dealer. The following day when the route man calls, he is paid for the sheets delivered the previous day, but allows credit to the newsstand operator for those remaining unsold. Consolidated has no proprietary interest in the newsstands and the relationship between it and the newsstands is solely that of seller and buyer.

In order to develop and increase its circulation, Consolidated offers an additional service in connection with the publication and distribution of its scratch sheets. It carries in each issue an advertisement in which telephone numbers are listed and the public is advised that calls may be made to Consolidated's offices for the purpose of obtaining racing results.

There is no substantial difference between the manner in which the business of Consolidated is conducted and that of the National Scratch Sheet which is published in Los Angeles by a competitor. Both are sold on the newsstands to the public and both permit telephone calls for the purpose of obtaining racing results.

Consolidated received daily news, including racing news, from the Continental Press over the interstate Morse wire facilities of Western Union. Consolidated pays for this news approximately

Five Hundred Dollars per week in accordance with its arrangement with Continental Press Service. This news is used in its daily and weekly publications. Prior to April 2, 1948, Consolidated had been receiving daily service from Continental Press Service over the Western Union interstate Morse wire facilities. On April 2, 1948, this news service was interrupted and discontinued and has not been since restored. Consolidated desires the restoration of this service and is ready, willing and able to continue to purchase news from the Continental Press Service.

Harold V. Belden, being duly sworn, deposes and says: [14]

That he has read the foregoing Affidavit and knows the contents thereof, and that the statements contained therein are true and correct to the best of his knowledge and belief.

/s/ HAROLD V. BELDEN.

Subscribed and sworn to before me this 21st day of April, 1948.

(Seal) /s/ F. A. E. BLOCK,

Notary Public in and for said County and State.

My Commission expires April 1, 1951.

[Endorsed]: Filed April 22, 1948. [15]

[Title of District Court and Cause.]

AFFIDAVIT

State of Ohio,
County of Cuyahoga—ss.

Edward J. McBride, an individual doing business under the fictitious name and style of Continental Press Service, being first duly sworn, deposes and says that Continental Press Service, hereinafter referred to as “Continental Press,” is a sole proprietorship owned by deponent with its principal office located in Cleveland, Ohio, and two other offices located in Chicago, Illinois and New York, New York.

Continental Press is engaged in the business of disseminating general news, including sporting and racing news, over the interstate and foreign Morse wire facilities of The Western Union Telegraph Company, hereinafter referred to as [16] “Western Union.”

Continental Press receives news of all types, principally sporting and racing news from throughout the North American continent, which it transmits over interstate Morse wire facilities of Western Union to its office in Chicago, Illinois. From its Chicago office, the news is sent over interstate Morse wires of Western Union to customers throughout the United States, Canada and Mexico, among which are newspapers, radio stations, and daily racing publications usually referred to as

scratch sheets. The news which the New York office receives from Chicago is relayed over separate interstate Morse wire facilities to eastern customers of Continental Press. When Continental Press has an application for service by a new customer or terminates a contract with an existing customer, it confers with Western Union and arranges for the extension or discontinuance of interstate Morse wire facilities to that particular customer. In each case where a customer is added, Western Union receives additional tariff for the use of the extended interstate wire facilities.

The main interstate Morse wire facilities of Continental Press at the presnt time cross every state in the Union and extend into Canada and Mexico.

Included among the subscribers of Continental Press who are served, directly or indirectly, in the various states, are Associated Press; United Press; Armstrong Publications; George Lawton, Publisher; Wahlmin Press Co., Inc., New York; Yonkers Daily Times, Yonkers, New York; Daily News and Trans-Radio Press, New York City; Illinois Sports News and Illinois News Association, Chicago, Illinois; Daily Sports News, Toronto, Canada; Daily Sports News, Detroit, Michigan; Texas Daily Sports News, Houston, Texas; Howard Sports Daily, Baltimore, Maryland; Harvey A. Jr., Miami, Florida; Daily [17] Sports News, Louisville, Kentucky; Times-Picayune, Daily Sports News, Daily State and Item Publishing Co., New Orleans, Louisiana; Columbus Journal and Columbus Dis-

patch, Columbus, Ohio; Old Pueblo Publishing Co., Tucson, Arizona; Sun Herald, Vancouver, Washington; and Victoria Times, Victoria, B. C. The following radio stations are also served: WTRY and WROW, Troy, New York; WINZ, Miami, Florida; WCAR and WLBK, Detroit, Michigan; WBNX, WFMO and WMCA, New York City; WLAP, Lexington, Kentucky; WITH, WCOM, WSID and WGIS, Baltimore, Maryland; WDAS, Philadelphia, Pennsylvania; and WRIP, Providence, Rhode Island.

General news and sporting news other than racing news, constitute from thirty to fifty per cent of the news furnished by Continental Press to its customers. Customers of Continental Press are free to distribute the news received from it in any manner or fashion they desire. Charges for such news service are based upon area, population, and other similar factors. Continental Press does not have any proprietorship or ownership interest in the business of its customers.

Consolidated Publishing Company of Los Angeles, California, is a customer of Continental Press and, prior to April 2, 1948, received by direct connection with the main interstate line of Continental Press, all types of news, including sporting and racing news, which Continental Press disseminated to its customers. For such service, Continental Press receives approximately Five Hundred Dollars from Consolidated Publishing Company. [18]

Edward J. McBride, being duly sworn, deposes and says that he has read the foregoing Affidavit and knows the contents thereof, and that the statements contained therein are true and correct to the best of his knowledge and belief.

/s/ EDWARD J. McBRIDE.

Subscribed and sworn to before me this 14th day of April, 1948.

(Seal) /s/ JOSEPHINE LEBIT,

Notary Public in and for said County and State.

My Commission expires Mar. 26, 1949.

[Endorsed]: Filed April 22, 1948. [19]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND
TEMPORARY RESTRAINING ORDER

It appearing that the Plaintiff has filed a verified complaint in the above-entitled action demanding either a temporary mandatory order and final mandatory order, or preliminary and final injunction, and praying that a temporary restraining order be issued without notice; and it further appearing from the affidavits of Edward J. McBride and Harold V. Belden filed in support thereof that Defendant, on April 2, 1948, interrupted and discontinued the interstate Morse wire facilities between Plaintiff and its customer, Consolidated

Publishing Company of Los Angeles, California; that Defendant will continue to refuse to provide Plaintiff with interstate Morse wire facilities, which facilities are necessary for the transmission of its general news and sporting news to its customer, Consolidated Publishing Company of Los Angeles, California; that such refusal is contrary to the provisions of the Federal [20] Communications Act of 1934; that without such immediate service, Plaintiff cannot transmit its news to Consolidated Publishing Company; that such refusal to allow Plaintiff to serve this customer will result in irreparable damage and injury to Plaintiff by the permanent loss of the aforementioned Consolidated Publishing Company as a customer for its news; that such continued refusal will result in irreparable loss of Plaintiff's prestige and good will in the Los Angeles area, and it appearing that such irreparable injury and damage will occur before notice can be served and a hearing had on Plaintiff's application for a preliminary injunction or a temporary mandatory order; and good cause appearing,

Therefore, it is hereby ordered that the Defendant, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with the Defendants be, and they are hereby enjoined and restrained from refusing to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, of Los Angeles, California, and De-

fendant is ordered to restore such services from the date of the service of this Order to and including the further order of this Court;

It Is Further Ordered that the Defendant herein show cause, if any there be, before the above-en-
[In margin O'Connor Judge] April
titled Court on the 30th day of ~~May~~, 1948, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard in the courtroom of the Honorable J. F. T. O'Connor, Judge of the said Court in the United States Courts and Post Office Building, Temple and Spring Streets in the City of Los Angeles, County of Los Angeles, State of California, why a preliminary injunction should not issue, enjoining the Defendants from refusing to furnish interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California, or a temporary mandatory order [21] pending the trial of the cause, should not issue ordering defendant to restore the above referred to services, except in accordance with the order of this Court.

It Is Further Ordered that this temporary order shall remain in full force and effect until the 30th day of April, 1948, or until further ordered by this Court.

Issued in the City of Los Angeles, County of Los Angeles, State of California, at Los Angeles on the 22nd day of April, 1948.

/s/ J. F. T. O'CONNOR,
Judge of the United States District Court.

[Endorsed]: Filed April 22, 1948. [22]

[Title of District Court and Cause.]

AFFIDAVIT OF J. W. INWOOD RESPONSIVE TO ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

State of California,
Southern District of California,
County of Los Angeles—ss.

J. W. Inwood, being duly sworn, deposes and says: He is Superintendent of defendant The Western Union Telegraph Company at Los Angeles, California;

The Western Union Telegraph Company is now, and continuously since long prior to 1872 has been, a corporation organized and existing under the laws of the State of New York for the purpose of maintaining and operating a general intrastate and interstate telegraph system and business throughout the United States and other countries;

Prior to the year 1872 the said corporation accepted the [23] provisions of the Act of Congress of July 24, 1866 (14 Stats. p. 221; 47 U.S.C.A. sec. 1) commonly known as the "Post Roads Act," and the provisions of section 536 of the Civil Code of the State of California, and throughout said time has been and still is maintaining and operating a general, intrastate and interstate telegraph system, with its lines along the highways and along and across the lands and waters of California and along the post roads throughout the United States;

At all times mentioned in the complaint defendant has been and still is maintaining and operating a public utility intrastate and interstate telegraph

system, under the control and regulation, as to its intrastate operations, of the Public Utilities Commission of the State of California, and, as to its interstate operations, of the Federal Communications Commission;

At all of the times mentioned in the complaint herein the Federal Communications Commission of the United States has, by its order in that behalf duly given and made, fixed and established defendant's "Tariff F.C.C. No. 219" governing the leasing and use of facilities such as those furnished by defendant to plaintiff and described in the complaint. Page 7 of said Tariff No. 219 has at all times mentioned in the complaint provided as follows:

"(8) The service: Leased Facility service as covered in this tariff consists of furnishing for the private use of customers, facilities for transmitting electrical signals between specified points. The furnishing of Leased Facility service is subject to the availability of facilities and equipment after considering the requirements of the Telegraph Company's telegraph message services. Further, the rates and regulations provided in this tariff contemplate the furnishing of service only to points and locations where [24] the Telegraph Company has facilities or can provide them at reasonable cost. All cases not meeting these requirements are subject to special consideration.

"Facilities furnished under this tariff may be employed only for the private use of those companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives and each such office shall transmit and receive its particular communications over the

equipment installed therein. Further, such facilities shall not be used either directly or indirectly for the handling of communications for the public or any person, firm or corporation other than those whose offices are connected to the circuits or their affiliated and subsidiary companies and their representatives. (Note: The restrictions set forth in this paragraph do not apply to facilities furnished to another communication common carrier.)”

The fifth revised page 8 (and the predecessor pages 8) of said Tariff No. 219 has, at said times, provided and continues to provide as follows:

“Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law”;

The facilities and services furnished to plaintiff by defendant described in the complaint herein are known as “Leased [25] facilities” and also as “Private line service and circuits”;

Said private line service and circuits leased to plaintiff by defendant consist of a continuous telegraph wire or channel under the exclusive control of plaintiff for telegraph communication between designated terminals in different states of the United States, with intermediate stations or drops at specified points, including the points in California designated in the letter of the Attorney General of the State of California to defendant

dated March 31, 1948, hereinafter referred to. At each such terminal and at each such intermediate station or drop there is a Morse telegraph instrument. The telegraph operator and all other persons attending to each terminal and station or drop are employed by and are under the exclusive control of plaintiff. Defendant at no time has had any connection whatever with either or any of said employees. Each telegraph communication initiated at any of said terminals or drops is transmitted over said private line or circuit to each terminal and to every station or drop on said private line or circuit—in other words, said private line or circuit and each terminal and drop thereon has been at all times operated exclusively by plaintiff, and the service thereon and thereby is entirely under plaintiff's exclusive control; defendant merely maintains said private line and circuit in operating condition;

At all of the times mentioned in the complaint said Tariff No. 219, page 7, prescribed by the Federal Communications Commission and Tariff Sheets Nos. 1399T and 1400T, prescribed by the California Public Utilities Commission, have contained and still contain the following identical language governing the public utility private line services and circuits furnished to plaintiff by defendant:

“In view of the fact that the subscriber has [26] exclusive control of his communications over the facilities furnished him by the Telegraph Company, and of the other uses for which facilities may be furnished him by the Telegraph Company, and because of unavoidsableness of errors incident to the services and to the use of such facilities of the Telegraph Company, the services and facilities furnished by the Telegraph Company are subject

to the terms, conditions and limitation herein specified and to such particular terms, conditions and limitations as are set out in the schedules applicable to particular services and facilities.”

No step has been taken by plaintiff or anyone else, to affiant’s knowledge, to obtain any change or modification in said page 7 or revised page 8 of said “Tariff FCC 219” or for modification or change of said Tariff Sheets Nos. 1399T and 1400T of the California Public Utilities Commission or the order of the latter Commission, dated April 6, 1948, hereinafter referred to, or to have either said tariff provisions or said order declared unreasonable or otherwise objectionable;

All, each and every of the services and facilities provided by defendant to plaintiff described in the complaint herein were furnished by defendant pursuant to the Tariffs and Regulations prescribed and established by the duly constituted Regulatory authorities and applications made by plaintiff to defendant. Neither of said applications stated that the facilities applied for were “to be used to supply plaintiffs customers with news, including sporting and racing news” (see complaint, page 2, line 31, to line 2, page 3) or for any other specified purpose, and the facilities furnished by defendant to plaintiff were as hereinafter stated and not otherwise; [27]

Each and every of said applications was executed by or on behalf of plaintiff, was delivered to defendant and accepted by the latter at 60 Hudson Street, New York City, and declared as follows:

“The undersigned agrees that the facilities furnished under this tariff shall not be used for any

purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law. This application shall become binding on both parties when accepted by the Company, such acceptance to be evidenced by the signature of one of its officers hereon or by the establishment of the service.”

On receipt of each such application and pursuant thereto, and in accordance with the lawfully established orders, regulations and tariffs prescribed by the regulatory authorities, defendant furnished the private line public utility facilities and services so applied for;

Defendant continued to maintain said leased private telegraph wire and drops in operating order for the private use of defendant until directed by the Attorney General and chief law enforcement officer of the State of California to discontinue the “drops” at the places specified in his letter of March 31, 1948, as hereinafter set forth;

Plaintiff has at all times had exclusive control of the communications over and by means of said facilities, and defendant has never policed, monitored or otherwise supervised or observed [23] the use of said facilities or any communications transmitted by means thereof, and has not been informed of any such communications or the use of said facilities otherwise than by the letter of March 31, 1948, from Attorney General Howser, and by the proceedings before the California Public Utilities

Commission referred to in said letter, and in the letter of March 4, 1948, from the District Attorney and the Sheriff of Kern County and the Chief of Police of Bakersfield, California, hereinafter referred to;

With reference to the discontinuance of service referred to in Paragraph VI of the complaint herein, affiant states that such discontinuance was not arbitrary, wrongful or without just cause, but that on the contrary, the facts with reference thereto are as follows:

At a time prior to February 18, 1948, the Public Utilities Commission of the State of California initiated that certain proceeding before said Commission entitled, "Case No. 4930; Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest";

Defendant was notified of said proceedings and appeared at the hearings had in the course thereof;

Testimony was taken by said Commission in said proceeding on February 18, 19, 25, 26, and March 10, 1948, and decision and order thereon were made on April 6, 1948;

Throughout the pendency of said proceeding before said Public Utilities Commission, Honorable Fred N. Howser was and still is the Attorney General and chief law enforcement officer of the State of California, and as such appeared in said proceeding; [29]

March 4, 1948, defendant received at its Bakersfield office, 1605 19th Street, Bakersfield, Califor-

nia, letter signed by Tom Scott, District Attorney of Kern County, California, J. E. Loustalot, Sheriff of Kern County, and H. V. Grayson, Chief of Police, Bakersfield, notifying defendant that defendant's telegraph instrument and wire (being part of the private line service and circuits leased by defendant to Continental Press Service) located at 1911 Edison Highway, Bakersfield, Kern County, California, had been and were on March 4, 1948, being used to violate section 337a and section 182 of the Penal Code of California, and requesting that defendant immediately discontinue said service and disconnect said telegraph instrument and wire at said address;

Following receipt of the letter just referred to, defendant discontinued the use of said wire and telegraph instrument at said 1911 Edison Highway, Bakersfield, California, on March 5, 1948, and service of said instrument and wire have not since been resumed;

On March 31, 1948, said Honorable Fred N. Howser, as Attorney General and chief law enforcement officer of California, signed and caused to be delivered to defendant a letter notifying defendant that defendant's facilities and services (being part of the private line service and circuits leased by defendant to plaintiff) at the following addresses:

333 Montgomery Street, San Francisco
1911 Edison Highway, Bakersfield
181 Andreas Road, Palm Springs
Room 211, Platt Building, San Bernardino
362 D Street, San Bernardino
208 West Eighth Street, Los Angeles
615 North La Brea, Los Angeles
919 Fourth Avenue, San Diego. [30]

were being used to furnish information to book-makers in violation of section 337a of the Penal Code of California, and in said letter the Attorney General, "as chief law enforcement officer of this State," demanded that defendant immediately discontinue the leasing of its facilities and service to plaintiff in California. Copy of said letter of said Attorney General to defendant is hereto attached, made a part hereof, and marked "Exhibit A";

Pursuant to and because of the demand of the Attorney General and chief law enforcement officer of the State of California of March 31, 1948, and the demand of the District Attorney, and Sheriff of Kern County and the Chief of Police of Bakersfield of March 4, 1948, defendant discontinued and it continues to discontinue its facilities and service to plaintiff which are described in said letter of the Attorney General;

The facilities and services so discontinued are the part of plaintiff's facilities and services referred to in the complaint herein which are in the State of California;

Promptly upon receipt of the respective letters of March 4 and March 31, 1948, above referred to, defendant informed plaintiff of the receipt of said letters and of defendant's intention to comply therewith, and thereafter said facilities and services were discontinued;

On or about the 6th day of April, 1948, said Public Utilities Commission of the State of California, in said case No. 4930, entitled as aforesaid, duly made and promulgated the following order:

"The above entitled case having been instituted on the Commission's own motion, public hearings having been held therein, said case now being ready

for decision, the Commission being fully advised in the premises and basing its decision [31] upon the evidence of record in this case and upon the findings of fact contained in the foregoing opinion,

“It Is Hereby Ordered that any communications utility operating under the jurisdiction of this Commission must refuse to establish service for any applicant, and it must discontinue and disconnect service to a subscriber, whenever it has reasonable cause to believe that the use made or to be made of the service, or the furnishing of service to the premises of the applicant or subscriber, is prohibited under any law, ordinance, regulation, or other legal requirement, or is being or is to be used as an instrumentality, directly or indirectly, to violate or to aid and abet the violation of the law. A written notice to such utility from any official charged with the enforcement of the law stating that such service is being used or will be used as an instrumentality to violate or to aid and abet the violation of the law is sufficient to constitute such reasonable cause.

“It Is Further Ordered that any person aggrieved by any action taken or threatened to be taken pursuant to the provisions of this decision shall have the right to file a complaint with this Commission in accordance with the law. This remedy shall be exclusive. Except as specifically provided herein, no action at law or in equity shall accrue against any communications utility because, or as a result of, any matter or thing done or threatened to be done pursuant to the provisions of this decision.

“It Is Further Ordered that each contract for communications service, by operation of law, shall

be deemed to contain the provisions of this decision, whether or not the same be actually included as a part of the application for [32] such service, and the provisions of said decision shall be deemed in law to be a part of any application for communications service, and the applicant for such service shall be deemed to have consented to the provisions of said decision as a consideration for the furnishing of such service. The term 'person', as used in this decision, shall include a subscriber to communications service, an applicant for such service, a corporation, a company, a co-partnership, an association, a political subdivision, a public officer, a governmental agency, and an individual.

"The term 'communications utility,' as used in this decision, includes a 'telephone corporation' and a 'telegraph corporation,' as those terms are defined in the Public Utilities Act. The secretary is hereby directed to serve, by registered mail, a certified copy of this decision upon each communications utility operating under the jurisdiction of this Commission and upon each appearance of record herein."

Copy of said order and decision was, prior to the filing of the complaint herein, transmitted by said Commission to and was received by defendant.

So far as known to affiant, no complaint has ever been made by plaintiff or by any one in plaintiff's behalf to the California Public Utilities Commission or to the Federal Communications Commission, or to any other officer or Commission, other than the complaint in this action, stating or claiming that plaintiff is or has been aggrieved by any Tariff, order or regulation of either of said Commissions herein referred to, or by said discontinu-

ance of said facilities and service, or any thereof, and said Tariffs and said order of the California Public Utilities Commission of April 6, 1948, are still in full force and effect. [33]

All of the acts and conduct of defendant referred to in the complaint and in this affidavit have been pursuant to, in reliance upon, and in conformity with the established Tariffs and orders prescribed by the Federal Communications Commission and the California Public Utilities Commission, and in reliance upon the representations and demands of State law enforcement officers as herein stated, and defendant has done no act or thing in violation of any law and has not refrained from doing or refused to do anything required by law, and has not in any manner prevented plaintiff from receiving intrastate or interstate telegraph service at the same charges, upon the same terms, and on conditions as favorable as like services by defendant are available under similar conditions to any other person.

/s/ J. W. INWOOD

Subscribed and sworn to before me this 4th day of May, 1948.

(Seal) /s/ JEAN F. CROWE,

Notary Public in and for said County and State.

My Commission expires May 28, 1949. [34]

EXHIBIT A

State of California
Department of Justice

OFFICE OF THE ATTORNEY GENERAL
600 State Building, Los Angeles 12

March 31, 1948

Western Union Telegraph Company
722 Market Street
San Francisco, California
Attention: General Manager

Gentlemen:

A survey of the transcript of the proceedings of February 18, 19, 25 and 26, and of March 10, 1948, before the Public Utilities Commission of the State of California at its hearings pertaining to the illegal use of Western Union wire services and/or telephonic equipment, indicates that you had leased wires to the Continental Press Service, which were and are engaged in furnishing information to book-makers in violation of Section 337a of the Penal Code of the State of California, at the following addresses:

333 Montgomery Street, San Francisco

1911 Edison Highway, Bakersfield

181 Andreas Road, Palm Springs

(Investigation by this office indicates the true location to be at 179 Andreas Road)

Room 211, Platt Building, San Bernardino

362 D Street, San Bernardino

208 West Eighth Street, Los Angeles

615 North La Brea, Los Angeles

919 Fourth Avenue, San Diego [35]

The transcript of the above mentioned proceedings sets out a provision of the contract as given

by you, Western Union, to the Continental Press Service in California, and I quote:

“The undersigned (i.e., Continental Press Service) agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcement agencies that the service is being supplied contrary to law.”

Pursuant to this quoted portion of your contract, by virtue of the terms and conditions therein contained, you are hereby notified that I, as Attorney General of the State of California, being designated as Chief Law Enforcement Officer of this State by our Constitution, do hereby demand that you immediately discontinue the leasing of any and all equipment to the Continental Press Service in California.

Very truly yours,

/s/ FRED N. HOWSER,

Attorney General of California.

FNH*md

cc Warren Olney, III, Counsel
Commission on Organized Crime
1204 Balfour Building
San Francisco 4

Received copy of the within this 5th day of May,
1948.

CHARLES H. CARR,
Attorney for Plaintiff.

[Endorsed]: Filed May 5, 1948. [36]

[Title of District Court and Cause.]

ANSWER

Comes now defendant above named, and for answer to the complaint, denies, avers and alleges, as follows:

I.

Admits the allegations of Paragraph I of the complaint.

II.

Admits the allegations of Paragraph II of the complaint.

III.

Answering Paragraph III of the complaint, defendant alleges that it is now, and at all times since prior to the year 1872, it has been, a corporation organized and existing under the laws of the State of New York, for the purpose of maintaining and operating, and has been and is maintaining and operating a general public [37] utility, intrastate and interstate telegraph system and business throughout the United States, including the State of California; and continuously since its organization defendant has accepted and exercised and continues to accept and exercise the right, privilege and franchise tendered by the Act of Congress of July 24, 1866 (14 Stats. p. 221), commonly known as the "Post Roads Act," to use the post roads throughout the United States for its public utility telegraph lines, and has accepted and exercised, and continues to accept and exercise, the right, privilege and franchise tendered by section 536 of the Civil Code of the State of California to construct, maintain and operate its telegraph lines

along and upon the public highways and along and across the lands and waters of the State of California.

IV.

Answering Paragraph IV of the complaint, defendant alleges that it has no knowledge or information sufficient to enable it to answer with regard thereto, and therefore and upon that ground denies that plaintiff is or at any time has been engaged in the business of disseminating information of sporting events or racing news either over the interstate and foreign communication wires and facilities of defendant or otherwise either to plaintiff's customers located throughout the United States or in Canada or in Mexico, or to any other persons or places;

Upon the same ground, defendant denies that news of sporting events is or has been transmitted to plaintiff's customers, either in interstate commerce or otherwise, by the use of a Morse wire or any wire furnished by defendant, to Florida, New York, Oregon, California or to intermediate states, or into Canada or Mexico, or to any other place or places;

Upon the same ground, denies that each or any of plaintiff's [38] customers receives or has received plaintiff's sporting or racing news service or any news service by direct or other connection with the main or other interstate or other Morse wire, or any wire belonging to or operated by defendant.

V.

Answering Paragraph V of the complaint, defendant alleges:

The leasing and operation of defendant's public utility facilities and service is now and at all times in the complaint mentioned, has been, as to interstate facilities and service, under the plenary control of the Federal Communications Commission, and, as to its intrastate operations and service in California, under the plenary control of the California Public Utilities Commission;

All of defendant's facilities and services which have been furnished to plaintiff as alleged in the complaint have been so furnished pursuant to, in accordance with, and as required by the Tariffs, schedules, rules, regulations and orders of the Federal Communications Commission, upon applications made by plaintiff as hereinafter stated;

At all of the times mentioned in the complaint Federal Communications Commission Tariff No. 219 has governed and controlled and continues to govern and control the operations, service and conduct of defendant in the leasing of its interstate, public utility communications facilities and services;

Throughout said time said Tariff No. 219 has provided and required, and continues to provide and require as follows:

"The Western Union Telegraph Company—Tariff F.C.C. No. 219—Original Page 7.

LEASED FACILITIES

(8) The service: Leased Facility service as covered in this tariff consists of furnishing for the private [39] use of customers, facilities for transmitting electrical signals between specified points. The furnishing of Leased Facility service is subject to the availability of facilities and equipment after considering the requirements of the Telegraph Company's telegraph message services. Further, the rates and regulations provided in this tariff contemplate the furnishing of service only to points and locations where the Telegraph Company has facilities or can provide them at reasonable costs. All cases not meeting these requirements are subject to special consideration.

Facilities furnished under this tariff may be employed only for the private use of those companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives and each such office shall transmit and receive its particular communications over the equipment installed therein. Further, such facilities shall not be used either directly or indirectly for the handling of communications for the public or any person, firm or corporation other than those whose offices are connected to the circuits or their affiliated and subsidiary companies and their representatives. (Note: The restrictions set forth in

this paragraph do not apply to facilities furnished to another communication common carrier.)

Issued: February 24, 1941.

Effective: March 31, 1941'';

At all of the times mentioned in the complaint said F.C.C. Tariff No. 219 has also provided and required, and continues to provide and require that facilities and service leased by defendant

“shall not be used either directly or indirectly for the handling of communications for the public or any person, [40] firm or corporation other than those whose offices are connected to the circuits or their affiliated and subsidiary companies and their representatives”;

Said Tariff F.C.C. No. 219 has, throughout said time provided and required and continues to provide and require that:

“Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law”;

On or about May 19, 1945, defendant received at its general offices, No. 60 Hudson Street, New York

City, New York, from Continental Press Service (said Continental Press Service being, as defendant is informed and believes, the name under which plaintiff was at the time doing, and continues to do business) application in writing that defendant lease to said Continental Press Service certain of defendant's public utility telegraph facilities and services, including a Morse operated private telegraph line from the City of Chicago, Illinois, to the City of Seattle, Washington, by way of Los Angeles and San Francisco, California, and Portland, Oregon, and intermediate cities, with "drops" connected with said leased line at various points in the several states traversed by said line, including points in California;

Defendant alleges that said application did not state that the facilities and service applied for or any part thereof [41] were to be used for any particular purpose other than the transmission of telegraph communications generally, and did not state that the facilities or service were to be used to supply plaintiff's customers or any one else with sporting and racing news, but, on the contrary, defendant alleges the fact to be that said application contained no statement as to the nature of telegraphic communications which plaintiff or any one else intended to transmit by means of said facilities and service;

Plaintiff's said application to defendant of May 19, 1945, contained the following statement:

"The undersigned requests The Western Union

Telegraph Company to furnish, subject to and in accordance with its lawful rates and regulations, the service described (including such modifications therein as may be ordered from time to time), for the established minimum period and thereafter until terminated by written notice from the undersigned, unless earlier terminated by the Company pursuant to its regulations, and agrees to pay for such service according to the Company's established billing practices. The undersigned agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law. This application shall become binding on both parties when accepted by the Company, such acceptance to be evidenced by the signature of one of [42] its officers hereon, or by the establishment of the service'';

On or about May 19, 1945, defendant accepted said application, and pursuant thereto and in accordance with the Tariffs, Regulations and Orders prescribed by the Federal Communications Commission, including said Tariff F.C.C. No. 219, defendant leased and furnished to plaintiff the telegraph facilities and service so applied for, for

the private use of said Continental Press Service; said facilities and service consisted of a private telegraph wire or channel for telegraph communication from Chicago, Illinois, by way of Los Angeles, San Francisco, Portland, Oregon, and intermediate cities in states traversed by said wire, to Seattle, Washington, with connecting wire or channels (commonly called "drops") extending from said private leased wire or channel at various points and places in the states traversed by said line, including the places in California hereinafter mentioned; at the respective terminals of said private wire or channel and at each "drop" therefrom, including "drops" at said points in California, hereinafter mentioned, the facilities and service so leased to plaintiff included a Morse telegraph instrument;

On March 4, 1948, and for a long time prior thereto, and continuously thereafter until April 2, 1948, "drops," including a Morse telegraph instrument as a part thereof, were maintained as a part of said leased private wire at each of the following places in California:

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Springs,
Room 211 Platt Building, San Bernardino,
362 D Street, San Bernardino,
208 West Eighth Street, Los Angeles,
919 Fourth Avenue, San Diego; [43]

Each of said "drops" was so maintained and

operated as that any message initiated at any such drop could be and was immediately transmitted to all other drops in the various states traversed by said leased wire, including all of said drops connected with said leased wire in California;

The premises at the terminals of said leased wire and at each place where such "drops" were connected were not under any control of defendant, but were, as defendant is informed and believes, under the exclusive control of plaintiff or of plaintiff's affiliates or subsidiaries;

The telegraph operator, and all other attendants and employees, at each of said "drops" and at all other places on said leased wire, were at all times employed by, and were under the exclusive control of plaintiff, and defendant had nothing to do either with the employment or services of any of such persons or of any one engaged in the transmission of messages or communications over or by means of said leased facilities and services, or with any such message or communication;

Under and pursuant to said Federal Communications Commission Tariff No. 219, all of the facilities and services so leased to plaintiff were required to be, and at all times were, for the exclusive private use of plaintiff and plaintiff's affiliates and subsidiaries, and the use and operation of said facilities and service and the transmission and receipt of communications by means thereof were at all times under plaintiff's exclusive control;

At no time did defendant or any one on defend-

ant's behalf have or exercise any control or supervision whatever over any use of said facilities and service so leased to plaintiff, or over any message or other communication transmitted by means thereof, nor did defendant at any time have any knowledge as to the purpose [44] of any such communication or message or the use made or intended to be made by plaintiff or anyone else of any such message or communication;

Defendant's sole contact with the facilities and service so leased to plaintiff was for the purpose of seeing that the same were kept in working order.

VI.

Defendant denies that on April 2, 1948, or at any other time or at all it wrongfully or arbitrarily or without just cause discontinued the interstate or any other facilities or service furnished by defendant to plaintiff, but, on the contrary, alleges that the facts in that respect were and are as follows, and not otherwise:

Prior to February 18, 1948, the California Public Utilities Commission, on its own motion, initiated a certain proceeding before said Commission entitled, "Case No. 4930; Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest";

Said California Public Utilities Commission, in the course of said proceedings, heard testimony on February 18, 19, 25 and 26, and March 10, 1948, and rendered its decision and made its order therein on April 6, 1948. Copy of said decision and order is hereto attached, and is hereby referred to and made a part hereof to the same extent as if here set forth in full, and marked "Exhibit A";

Throughout said proceeding, Honorable Fred N. Howser was, and ever since January 1, 1947, has been and still is the Attorney [45] General and chief law enforcement officer of the State of California; as such Attorney General and chief law enforcement officer, he appeared and participated in said hearing before said Commission;

On March 4, 1948, defendant received letter signed by Tom Scott, then and now District Attorney of Kern County, California, J. E. Loustalot, then and now Sheriff of said Kern County, and H. V. Grayson, then and now Chief of Police of the City of Bakersfield, California, stating that defendant's telegraph instrument and wire (being part of the private line service and circuits leased by defendant to Continental Press Service, as aforesaid) located at 1911 Edison Highway, Bakersfield, Kern County, California, had been and were on March 4, 1948, being used to violate section 337a and section 182 of the Penal Code of California, and demanding that defendant immediately disconnect and discontinue said telegraph instrument and wire at said address. Copy of said

letter is hereto attached, marked "Exhibit B" and is here referred to and made a part hereof to the same extent as if here set forth in full;

On March 31, 1948, defendant received from said Honorable Fred N. Howser, as Attorney General and chief law enforcement officer of the State of California, letter stating that defendant's facilities and service (being part of the facilities and service so leased by defendant to plaintiff as aforesaid) at each of the addresses in said letter set forth, were being used in violation of the laws of the State of California, and demanding that defendant immediately discontinue the facilities and service to plaintiff in said letter described; copy of said letter is hereto attached, marked "Exhibit C," and is here referred to and made a part hereof to the same extent as if here set forth in full;

Immediately following receipt of said letters of March 4, 1948, and March 31, 1948, just referred to, defendant informed [46] plaintiff of such receipt and of its intention to comply with the demands made therein. On April 2, 1948, defendant, pursuant to and in reliance upon the statements and representations made in said letters, and in the belief that said representations and statements were true and that the facilities described in said letters were being used and service supplied by means thereof for the purpose of violating the laws of the State of California, discontinued the facilities and service so leased by it to plaintiff at the places and points specified in said letters, and immediately informed plaintiff of such discontinuance;

On April 6, 1948, said Public Utilities Commission of the State of California rendered its decision and made its order in said Case No. 4930, as set forth in Exhibit A hereto attached;

Copy of said decision and order was caused by said Commission to be transmitted to and was received by defendant, and, as defendant is informed and believes, and, therefore states the fact to be, plaintiff was fully informed with reference thereto prior to the filing of the complaint in this action;

Pursuant to and in reliance upon said F.C.C. Tariff No. 219, and the above quoted stipulation by plaintiff in its application to defendant of May 19, 1945, and because of, pursuant to, and in reliance upon the truth of said letter from said District Attorney and Sheriff of Kern County, California, and the Mayor of Bakersfield of March 4, 1948, and because of, pursuant to and in reliance upon the truth of the letter from the Attorney General of California, of March 31, 1948, the part of defendant's said facilities and service so leased to plaintiff located at the points stated in said letters was disconnected and discontinued, and, because of, pursuant and in obedience to and in reliance upon the decision and order of said California Commission attached hereto and marked [47] Exhibit A, as aforesaid, defendant has continued to discontinue and disconnect said facilities and services.

VII.

Defendant has no knowledge, information or be-

lief upon the subject sufficient to enable it to answer with regard thereto, and therefore and on that ground denies that Consolidated Publishing Company is a partnership or that said partnership is or at any time has been engaged in the business of disseminating either general, sporting or racing news either by means of daily or weekly publications referred to as "scratch sheets" or otherwise.

VIII.

Defendant further alleges that discontinuance by it of the facilities and service so leased to plaintiff as aforesaid was in reliance upon and in the belief that the statements and representations made to it in said letters from the Attorney General of California and from the District Attorney and the Sheriff of Kern County and the Chief of Police of the City of Bakersfield, California, were and are true, and in the belief, based on such reliance, that defendant's facilities and service so leased to plaintiff were being used and service was being supplied thereby for the purpose of instigating and encouraging the unlawful acts condemned by sections 337a and 182 of the Penal Code of California, and said discontinuance of service has been continued also in reliance upon the decision and order of the California Public Utilities Commission of April 6, 1948 (Exhibit A hereto attached) and upon Federal Communications Commission Tariff No. 219, page 8, hereinbefore quoted and referred to, and upon the stipulation in plaintiff's application of May 19, 1945, heretofore referred to.

IX.

Admits that plaintiff has applied to defendant for and [48] has been supplied by defendant with interstate Morse wire facilities, but alleges that such facilities and service were and are as hereinbefore described, and not otherwise, and that the furnishing thereof has been under, pursuant to, and in accordance with the Tariffs, rules, regulations and orders of the public regulatory bodies and the application of plaintiff, all as hereinbefore stated, and not otherwise, and defendant denies that it has disconnected or discontinued such facilities or service, or that it continues to disconnect or discontinue the same arbitrarily or without just cause, or otherwise than as hereinbefore stated.

X.

Defendant has no information or belief upon the subject sufficient to enable it to answer with regard thereto, and therefore and on that ground denies that plaintiff cannot transmit its news to Consolidated Publishing Company or to any other company or person over interstate Morse wire facilities unless defendant is compelled or required by order of this court to continue to supply plaintiff with such facilities;

Denies that defendant has refused to provide such service or facilities to plaintiff, but, on the contrary, alleges the fact to be that it is now and at all times has been ready and willing to furnish facilities and service to plaintiff and to all other persons in accordance with the Tariffs, Rules and

Regulations of the Federal Communications Commission and of the California Public Utilities Commission, and in such manner as not, by means of such facilities and service, to violate any law of the United States or the State of California or of any other State.

XI.

Defendant denies that its failure to supply plaintiff with its facilities and service has caused or will cause plaintiff [49] irreparable or any damage;

Denies that plaintiff has no adequate remedy at law; on the contrary, alleges the fact to be that plaintiff has and at all times has had the right and privilege of applying to the Federal Communications Commission to change, modify or abolish the provisions of said Tariff No. 219 heretofore quoted, under and pursuant to which said facilities and service were discontinued as aforesaid, if, as plaintiff alleges, said provisions or some one or more thereof are arbitrary or otherwise unreasonable, or if plaintiff is otherwise aggrieved thereby, and plaintiff has at all times had and still has the right and privilege of making like application to the California Public Utilities Commission to change, modify or abolish said Tariffs 1399T and 1400T and said order of April 6, 1948, if either said Tariff or said order is unreasonable or if plaintiff is aggrieved thereby;

That because of the plenary power and control of said Federal Communications Commission and the California Public Utilities Commission over

the conduct, operations and services of defendant, defendant had and has no option except to strictly conform to and abide by the Tariffs, regulations, rules and orders of said Commissions within their respective jurisdictional spheres, and it has so conformed.

XII.

Defendant alleges that it has not, in any manner or at all, prevented plaintiff or any other person from receiving any service from defendant, either in interstate or foreign communication or otherwise or at all by wire or otherwise, at the same charges, and upon terms or conditions as favorable as the charges, terms and conditions given by defendant for like communication under similar conditions to any other person. [50]

XIII.

Defendant alleges that there is and has been no application by the Attorney General of the United States or request by the Federal Communications Commission for the filing of this or any action, nor any allegation by either said Attorney General or said Commission of failure by defendant to comply with, or that defendant has violated any of the provisions of Chapter 5, Title 47 of the United States Code, and that this action was commenced and is being maintained without any such application or request. [51]

ANSWER TO SECOND CAUSE OF ACTION

Answering the second and separate cause of action, defendant denies, avers and alleges as follows:

I.

Defendant hereby refers to and makes a part hereof, to the same extent as though set out in full herein, paragraphs I to XIII, inclusive, of the foregoing answer to plaintiff's first alleged cause of action.

II.

Defendant has no information or belief upon the subject sufficient to enable it to answer with regard thereto and therefore on that ground denies that plaintiff is, or at any time has been, engaged in the business of disseminating information of sporting events or racing news, either over interstate and foreign communications wires and facilities of defendant or otherwise; upon the same ground denies that any such news is transmitted to plaintiff's customers in interstate commerce by the use of a Morse code furnished by defendant; upon the same ground denies that plaintiff, or each or any of plaintiff's customers, receives or has received any sporting or racing news service by direct connection with main interstate Morse wire, or that each or any sporting or racing news message is transmitted to all or any of plaintiff's customers.

III.

Defendant alleges that its public utility telegraph facilities and service have been furnished to plaintiff as in this answer heretofore stated, and not otherwise; that said facilities and service were

furnished pursuant to application of plaintiff and in accordance with the Tariffs, rules and regulations of the Federal Communications Commission and the Tariffs, rules and regulations of the California Public Utilities Commission, as in this answer [52] heretofore stated, and that the discontinuance of said facilities and service was, and continuance of such discontinuance is as stated in this answer, and not otherwise, and that such discontinuance of service was and is as required and demanded by law enforcement officers of the State of California as hereinbefore stated, and pursuant to and in accordance with the Tariffs, rules, regulations and orders of said Federal and State Commissions and as authorized by plaintiff's express agreement set forth in plaintiff's application to defendant for such service, all as hereinbefore in this answer set forth, and not otherwise.

IV.

Defendant has been and is, by the order of said California Public Utilities Commission, dated April 6, 1948, forbidden to resume such facilities and service to plaintiff.

Wherefore defendant prays that it be hence dismissed and for its costs.

LAWLER, FELIX & HALL,
OSCAR LAWLER,
/s/ OSCAR LAWLER,

Attorneys for defendant, The Western Union
Telegraph Company. [53]

EXHIBIT "A"

Decision No. 41415

Before the Public Utilities Commission of the
State of California

Case No. 4930

Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest.

F. V. Rhodes and Marshall K. Taylor, for California Independent Telephone Association; Marshall K. Taylor, for Associated Telephone Company, Limited, San Joaquin Associated Telephone Company, and Consolidated Telephone Company; Pillsbury, Madison & Sutro, by John A. Sutro and Francis N. Marshall, for Pacific Telephone and Telegraph Company; Pillsbury, Madison & Sutro, by Hugh Fullerton and Henry G. Hayes, for Western Union Telegraph Company, respondents. Fred N. Howser, Attorney General, for the State of California, John H. Hanson, Chief Investigator of the Special Crime Study Commission on Organized Crime, for the State of California; Roger Arnebergh, for the City of Los Angeles; Warren Olney, for State Commission on Organized Crime; Everett

C. McKeage and Roderick B. Cassidy of the Commission's Staff, appearing for the Public Utilities Commission.

OPINION

Public hearings in this matter were held, before Commissioner Huls and Examiner Syphers, on February 18 and 19, 1948, at Los Angeles, February 25 and 26, 1948, at San Francisco, and March 10, 1948, at Sacramento. On these dates evidence was adduced and on the last-named date the matter was submitted.

These hearings were initiated on the Commission's own motion after the Commission had informally considered the subject matter of the instant investigation and after the receipt of a letter,¹ dated December 12, 1947, from the Special Crime Study Commission on Organized Crime, alleging that organized bookmaking [18] and the so-called "wire service" on which it depends are able to exist only because of their extensive use of the facilities of communications utilities.

The provisions of Section 337a of the Penal Code denounce bookmaking as a public offense.

At the hearing, testimony was introduced by the Attorney General of the State of California which included information showing the number of arrests for bookmaking,² by counties, in the State, the

¹ Exhibit No. 2.

² As used in this respect bookmaking refers to any arrangements for the taking of off-track bets on horse racing.

number of telephones seized by police officers, the number of convictions for bookmaking, and various other information.³ These exhibits clearly indicate that there has been a large amount of bookmaking conducted in the State of California, particularly in the more populous counties such as Alameda, San Diego, San Francisco, and Los Angeles. Testimony was received from the Sheriffs of Imperial, Los Angeles, and Alameda Counties, from the Chiefs of Police of the Cities of Long Beach, Los Angeles, Fresno, Merced, and Stockton, from the U. S. Attorney for the Southern District of California, and from the District Attorneys of Los Angeles, San Diego, Stanislaus, Alameda, and Sacramento Counties, all of which testimony indicated that bookmaking is a major law enforcement problem. This testimony further indicated [56] that bookmaking is a definite evil in that it promotes gangsterism, contributes to delinquency and non-support, and fosters, within the public itself, a disrespect for law enforcement. These officials were practically unanimous in stating that every effort should be made to stamp out bookmaking and they further stated that bookmakers were almost completely dependent upon the use of telephone and telegraph facilities. It was the conclusion of these

³ Exhibit No. 3 showed this information as related to cases handled by District Attorneys throughout the State; Exhibit No. 4 showed the same information as to cases handled by Sheriffs' Offices; and Exhibit No. 5 showed the same information as to cases handled by Police Departments.

law enforcement officials that one of the most effective methods of controlling bookmaking would be to curtail, or prohibit completely, if possible, the use, by bookmakers, of telephone and telegraph facilities.

Other testimony was presented at the hearing indicating, in some detail, the methods used by bookmakers in carrying on their business. It was developed that, while there is legalized *pari mutuel* betting at the race tracks in California, the operators and proprietors of these licensed tracks are not favorable to illegal bookmaking operations. They take the view that off-track bookmakers constitute "parasites" and are undesirable. Accordingly, it is the general practice at race tracks in California to prohibit any activities which would further illegal bookmaking. To this end all of the public telephones at the race tracks are locked approximately a half hour before the starting time of each race. In addition, any special activity which has for its purpose the gathering and disseminating of racing information, other than that gathered and disseminated by the regular newsgathering agencies, is prohibited. Only the authorized press services and newspapers have access to the track press boxes. The so-called specialized racing information services are barred. [57]

The testimony indicated that there has developed in the United States special racing news-gathering services. Among these are the Continental Press Service and the Pioneer News Service. According

to the testimony, the Continental Press Service consists of a wire service which is leased from the Western Union and which has outlets at various cities throughout the United States; specifically, this press service has the following drops in California:

Name of Subscriber	Address	Date Service Started
Tejon News	1911 Edison Highway Bakersfield	5-12-45
Consolidated Pub- lishing Co.	615 N. La Brea Ave., Los Angeles	5-12-45
Los Angeles Journalist	208 W. 8th St. Los Angeles	5-12-45
George Zouganiles	181 Andreas Rd., Palm Springs	9- 3-46
Arrowhead News	362 D Street San Bernardino	8-12-46
Colton News	211 Platt St. San Bernardino	8-12-46
Southwest News	919 4th Avenue San Diego	11- 5-45
Krelling & Cohen	333 Montgomery St. San Francisco	5-12-45

This press service is a Morse wire and the drops consist of both sending and receiving telegraph sets.

The Pioneer News, having headquarters at 333 Montgomery Street, San Francisco, California, is a service consisting of a wire leased from Western Union, over which is operated teleprinter or ticker sets. These teleprinters are the same instruments as are used in reporting stock-market news and are

located at various drops in California; specifically, these locations are: [58]

Name	Address	Date Service Started	Date Temp. Discon.
Roy Simon	1910 Tuolumne St. Fresno	6-22-46	2-19-48
J. Bozeman	326 Virginia St. Vallejo	5-25-46	1-29-48
W. Musso	215 Georgia St. Vallejo	5-25-46	1-29-48
J. Farrell	216 Georgia St. Vallejo	5-25-46	1-23-48
Mint Smoke Shop	237 Georgia St. Vallejo	8-14-47	1-29-48
Del Kennedy	1160 Old Country Rd. Belmont	10- 8-45	2-19-48
M. Magee	1617 Old Country Rd. Belmont	7-19-47	2-19-48
C. Atkin	145 Montgomery St. San Francisco	10- 8-45	2-19-48
Pioneer News	127 Montgomery St. San Francisco	1-30-46	2-19-48
F. Masonie	145 Mason St. San Francisco	3- 4-46	2-19-48
101 Service Station	Bayshore Highway Bayshore	1-31-47	4-16-48
Andy's Service	2637 Bayshore Highway Bayshore	8-16-47	1-30-48
Geneva Club	3201 Geneva Ave. Bayshore	11-17-47	2-19-48

It will be noted from an analysis of the above table that most of the drops of the Pioneer News Service were temporarily disconnected after the commencement of these hearings on February 18, 1948.

While the technical equipment of these two wire services, the Continental Press and the Pioneer News, are different in that one uses telegraph keys and the other uses teleprinters, still, in other respects, the basic method of operation is similar. In-

formation as to this method of operation was produced at the hearing. Since the Continental Press and the Pioneer News are among those services which are barred from the race tracks, they use various unorthodox methods to obtain information. The most common of these [59] methods, according to the testimony, is to use "signalers" or "wigwaggers", individuals who attend the races at the track and, by a system of signals, relay information to confederates outside who, in turn, send the information to the wire services.

Exhibits Nos. 33 to 37, introduced in evidence, consist of photographs showing a phone installation and a telescope in a house within view of the Santa Anita Race Track. The equipment shown in the photographs was used by one Ed Coplansky who, apparently, employed a telescope to observe signals from wigwaggers within the track. The information so obtained was telephoned to a drop of one of the wire services. The phone used by Coplansky was one which illegally had been tapped into the phone line of the owner of a nearby house.

The apparent reason these specialized wire services go to such extremes to obtain information is that special information is needed by their clients in order to conduct successful bookmaking activities. According to the testimony the information sent out over the regular news services and published in the regular newspapers, and even the detailed description of the running of races given over the radio, do not supply sufficient details to

permit successful bookmaking. A bookmaker needs the following information: (1) direct race odds and fluctuations in these odds; (2) the post time; (3) the exact off time within a matter of seconds; (4) a brief description of the race; (5) results of the race; (6) prices paid. In addition, a bookmaker needs information as to last-minute jockey changes and track conditions. These details are only furnished by the special racing wire service agencies.

As previously indicated, this detailed information is obtained at the race track by one device or another, then it is phoned to one of the offices of the wire service. At this office the information is placed on the wire and is immediately relayed to all of the drops of that particular wire service. Testimony was presented showing the operation of these drops. As soon as racing information is received it is called over a loud-speaker system. In front of the loud speaker are various phones, with the receivers off the hook, and, apparently, at the other end of these phones, bookmakers are listening for the information. Thus, in a matter of seconds, it is possible to get the information from the track to the bookmakers.

Testimony was presented by various police officers and sheriff's office employees as to visits they had made to these various wire service drops. In each of these places, according to the testimony, there are multiple phone installations. Instances were reported of as many as 26 phones in one room and other testimony presented by the telephone

company showed the subscribers to these various phones. Photostatic copies of the telephone cards listing the names of these subscribers were received in evidence as Exhibits Nos. 38 to 79, inclusive, and 80 to 92, inclusive. A general examination of these cards discloses that, while there were several phones in one place, most of them were listed under various fictitious names, including such terms as secretarial services, process service, research companies, printing companies, welding works, and, also, the names of various individuals.

Apparently, multiple phone installations are a necessary part of the equipment used in disseminating racing information to [61] bookmakers. Testimony was presented indicating that, in some cases, these multiple phone installations result from unauthorized extensions of existing facilities, while in other cases they are made by the telephone companies.

Exhibits Nos. 16 to 27, inclusive, consist of photographs taken by a sergeant of the Los Angeles Police Department, showing the facilities at some of the wire service drops in Los Angeles. In each of these instances equipment consists of an instrument for receiving information over the telegraph wire and several phones for relaying this information to outside subscribers. These outside subscribers pay for this service at rates varying from \$4.00 per month to \$339.24 per month. There is set out

below the rates paid by the eight subscribers to the Continental Press Service previously listed:

Subscriber	Monthly Charge
Tejon News	\$144.40
Consolidated Publishing Company	63.00
Los Angeles Journalist	4.00
George Zouganiles	72.27
Arrowhead News	65.93
Colton News	4.00
Southwest News	197.67
Krelling & Cohen	339.24

Additional testimony was presented by police officers as to raids they had made on various locations within the State of California. At some of these locations, including drops on the previously mentioned wire services, it was found that book-making was being carried on.

Testimony was received from representatives of the Western Union, setting out the manner in which these wire services are furnished. Arrangements for the Morse wire used by Continental Press were made in Cleveland, Ohio, and the charges for that lease [62] are paid at Cleveland. The Pioneer News lease, which started October 8, 1945, was arranged for by Stanley Cohen, and, apparently, the main office of Pioneer News is 333 Montgomery Street, San Francisco, California.

Respondent utilities in this case, so far as they were present at the hearing, indicated that their companies had no desire to furnish service for illegal uses and, almost unanimously, they indicated willingness to remove or refuse service whenever a bona fide law enforcement agency instructed them to do so. However, they further contended that

they were not policemen and it was without the scope of their authority to attempt to specifically police their subscribers in an effort to determine whether or not the facilities were being used for illegal purposes.

Another problem concerns the question as to whether or not a utility may be held liable for damages in an action brought by a subscriber to or applicant for service in those cases where the utility has discontinued or refused to extend service to such subscriber or applicant and, in this connection, it is the position of the utilities that they should not be subjected to any rule which would force upon them such actions for damages. We are well aware of the position of the utilities in this matter. However, it is our view, in the light of the evidence adduced in this matter, that certain lawful steps can be taken by the utilities which will curtail the use of their facilities by bookmakers.

From the foregoing evidence, we find that bookmaking is being conducted throughout the State of California on a large scale and, in order to conduct successful bookmaking, the operators thereof must have information in excess of that which can be obtained through regular news and radio channels. Accordingly, there has grown up a specialized wire service which has for its principal purpose the dissemination of detailed racing information within a matter of minutes after the occurrence of the actual events. This information includes details of the track conditions, betting odds, jockey changes,

and other facts occurring immediately prior to the running of the race, a description of the running of the race and the results thereof. These wire services sell this information to bookmakers who, in turn, use it in conducting their business. We, also, find that successful bookmaking cannot be conducted without access to these wire services or without access to telephone facilities.

We further find that it is in the public interest to require communications utilities to refrain from furnishing or continuing to furnish any telephone or telegraph service that will be or is being used in furthering bookmaking or related illegal activities. The use of communications facilities in furtherance of bookmaking being illegal, it follows that such use is contrary and detrimental to the public interest. Additionally, the evidence shows that, as of January 31, 1948, there were held by the fifteen largest telephone companies operating in this State 241,248 applications for telephone service, that could not be filled because of lack of instruments, facilities and materials. This situation makes it imperative that all communications instrumentalities and facilities be employed in the public interest.

The right of a person to utility services, such as telephone and telegraph, is not an inherent right but is due solely to the fact that the State, in the exercise of its police power, has seen fit, under the provisions of the Public Utilities Act, [64] to require the utility to serve the public without undue

or unreasonable discrimination. It, therefore, must be concluded that the State, having the authority to compel a utility to render service, has the authority to impose conditions under which such service may be furnished or terminated. (See *Partnoy v. Southwestern Bell Telephone Co.*, Missouri Public Service Commission, June 13, 1947, 70 P.U.R. (N. S.) 134.) It is established by statute in this State that a telephone or telegraph company is not required to accept messages which will "instigate or encourage the perpetration of any unlawful act * * *." (Section 638, Penal Code.)

It is the positive duty of a communications utility to exercise vigilance to prevent the unlawful use of its instrumentalities and facilities. Such utility exercises a valuable and extraordinary privilege and, in turn, incurs corresponding obligations to the public. Surely, one of its highest obligations is to exercise vigilance to see that its instrumentalities and facilities are not used in aiding and abetting the commission of crime. We are not so naive as to believe that the operators of wire services, as discussed in this decision, can conduct their business of disseminating racing information without general knowledge as to the activities of their customers. The evidence in this case shows that some of the users of these wire services are engaged in bookmaking. The evidence further discloses instances of multiple telephone installations, which installations are aiding the activities of bookmakers. Therefore, we believe that any such in-

installations should be scrutinized very carefully by the utilities furnishing the services and that additional installations should not be made without careful inquiry as to the nature of their use. [65]

It is the conclusion of this Commission that communications instrumentalities and facilities should not be furnished to persons who will use them for bookmaking or related illegal purposes; nor should they be furnished where there is strong evidence to indicate that the use will be for such illegal purposes. Neither should the furnishing of such instrumentalities and facilities be continued where reasonable cause exists for believing that such facilities are being so used. There is a duty resting upon communications utilities to refuse installations or to discontinue service when these conditions exist. There is a further duty on the utility to make reasonable inquiry as to the use of facilities and, in particular, this is true where the facilities are being installed in unusual circumstances.

ORDER

The above entitled case having been instituted on the Commission's own motion, public hearings having been held therein, said case now being ready for decision, the Commission being fully advised in the premises and basing its decision upon the evidence of record in this case and upon the findings of fact contained in the foregoing opinion,

It Is Hereby Ordered that any communications utility operating under the jurisdiction of this Commission must refuse to establish service for

any applicant, and it must discontinue and disconnect service to a subscriber, whenever it has reasonable cause to believe that the use made or to be made of the service, or the furnishing of service to the premises of the applicant or subscriber, is prohibited under any law, ordinance, regulation, or other legal requirement, or is being or is to be used as an [66] instrumentality, directly or indirectly, to violate or to aid and abet the violation of the law. A written notice to such utility from any official charged with the enforcement of the law stating that such service is being used or will be used as an instrumentality to violate or to aid and abet the violation of the law is sufficient to constitute such reasonable cause.

It Is Further Ordered that any person aggrieved by any action taken or threatened to be taken pursuant to the provisions of this decision shall have the right to file a complaint with this Commission in accordance with law. This remedy shall be exclusive. Except as specifically provided herein, no action at law or in equity shall accrue against any communications utility because, or as a result of, any matter or thing done or threatened to be done pursuant to the provisions of this decision.

It Is Further Ordered that each contract for communications service, by operation of law, shall be deemed to contain the provisions of this decision, whether or not the same be actually included as a part of the application for such service, and the provisions of said decision shall be deemed in

law to be a part of any application for communications service and the applicant for such service shall be deemed to have consented to the provisions of said decision as a consideration for the furnishing of such service.

The term "person," as used in this decision, shall include a subscriber to communications service, an applicant for such [67] service, a corporation, a company, a co-partnership, an association, a political subdivision, a public officer, a governmental agency, and an individual.

The term "communications utility," as used in this decision, includes a "telephone corporation" and a "telegraph corporation," as those terms are defined in the Public Utilities Act.

The Secretary is hereby directed to serve, by registered mail, a certified copy of this decision upon each communications utility operating under the jurisdiction of this Commission and upon each appearance of record herein.

This decision shall become effective after the expiration of twenty days from and after the date hereof.

Dated at San Francisco, California, this 6th day of April, 1948.

R. E. MITTELSTAEDT,
JUSTUS F. CRAEMER,
IRA H. ROWELL,
HAROLD P. HULS,
KENNETH POTTER,
Commissioners. [68]

EXHIBIT "B"

Tom Scott

District Attorney

COUNTY OF KERN
STATE OF CALIFORNIA

March 4, 1948.

Western Union Telegraph Company,
1605 19th Street,
Bakersfield, Calif.

Gentlemen:

This is to notify you that there is a Western Union Telegraph Company telegraph machine and wire leased by your company, or contracted for by your company, that race horse results are received over this wire by virtue of a telegraph key and the use of some code. That said service is furnished to or contracted by the Tejon Sport News or James Mellow, alias James Monroe, or others whose names are unknown to the undersigned. That said leased or contracted machine and wire of your company is located at 1911 Edison Highway, Kern County California at what is known as the Old Ice House.

You are notified that said telegraph machine and wire is used in the County of Kern to violate Section 337a of the Penal Code of the State of California defining bookmaking and also Section 182 defining conspiracy. This telegraph machine and wire is used to aid, assist, and carry on the business of illegal bookmaking by several known illegal bookmakers in Kern County and by James Mello alias James Monroe, or the person who contracted

for and uses said telegraph machine and wire at said address on Edison Highway. [70]

This is to notify you of the illegal use of said telegraph machine and wire and to request that you immediately discontinue the service and disconnect said telegraph machine and wire at said address.

TOM SCOTT,

District Attorney of
Kern County, Calif.

J. E. LOUSTALOT,

Sheriff of Kern County,
California.

H. V. GRAYSON,

Chief of Police of the
City of Bakersfield. [71]

EXHIBIT "C"

State of California
Department of Justice

OFFICE OF THE ATTORNEY GENERAL

600 State Building
Los Angeles 12

March 31, 1948

Western Union Telegraph Company
722 Market Street
San Francisco, California
Attention: General Manager

Gentlemen:

A survey of the transcript of the proceedings of

February 18, 19, 25 and 26, and of March 10, 1948, before the Public Utilities Commission of the State of California at its hearings pertaining to the illegal use of Western Union wire services and/or telephonic equipment, indicates that you had leased wires to the Continental Press Service, which were and are engaged in furnishing information to book-makers in violation of Section 337a of the Penal Code of the State of California, at the following addresses

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Spring.

(Investigation by this office indicates the true location to be at 179 Andreas Road.)

Room 211, Platt Building, San Bernardino,
362 D Street, San Bernardino,
208 West Eighth Street, Los Angeles,
615 North La Brea, Los Angeles,
919 Fourth Avenue, San Diego. [73]

The transcript of the above mentioned proceedings sets out a provision of the contract as given by you, Western Union, to the Continental Press Service in California, and I quote:

“The undersigned (i.e., Continental Press Service) agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the

service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcement agencies that the service is being supplied contrary to law.”

Pursuant to this quoted portion of your contract, by virtue of the terms and conditions therein contained, you are hereby notified that I, as Attorney General of the State of California, being designated as Chief Law Enforcement Officer of this State by our Constitution, do hereby demand that you immediately discontinue the leasing of any and all equipment to the Continental Press Service in California.

Very truly yours,

/s/ FRED N. HOWSER,

Attorney General of
California.

FNH*md

cc Warren Olney, III, Counsel

Commission on Organized Crime

1204 Balfour Building

San Francisco 4. [74]

United States of America,

Southern District of California,

Central Division,

County of Los Angeles—ss.

J. W. Inwood, being by me first duly sworn, deposes and says: that he is Superintendent of The

Western Union Telegraph Company, a corporation, at Los Angeles, the defendant in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true; and that he makes this verification for and on behalf of said corporation.

/s/ J W. INWOOD.

Subscribed and sworn to before me this 4th day of May, 1948.

[Seal] JEAN F. CROWE,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires May 28, 1949.

Received copy of the within this 5th day of May, 1948. ..

CHARLES H. CARR,
Attorney for Plaintiff.

[Endorsed]: Filed May 5, 1948. [75]

At a stated term, to wit: the February Term, A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles

on Wednesday, the 5th day of May in the year of our Lord one thousand nine hundred and forty eight.

Present: The Honorable J. F. T. O'Connor,
District Judge.

[Title of Cause]

This cause coming before the Court at this time for hearing on order to show cause and temporary restraining order heretofore filed on April 22, 1948, and continued to this time for hearing; Chas. H. Carr and Bryant Burton, Esqs., appearing as counsel for the plaintiff, and Oscar Lawler, Esq., appearing as counsel for the defendant; and the said Chas. H. Carr, Esq., having argued in support of the order to show cause directed to the defendant to show cause why a preliminary injunction should not issue enjoining the defendant as therein requested, and the said Oscar Lawler having argued in opposition thereto, and the Court having made a statement, it is now by the Court ordered that the temporary restraining order heretofore issued be vacated and that the request for the preliminary injunction be denied, and that the temporary mandatory order requested by the plaintiff pending the trial of the cause be likewise denied with exception allowed to the plaintiff. [76]

In the District Court of the United States for
the Southern District of California, Central
Division

No. 8158-O'C

EDWARD J. McBRIDE, doing business as Con-
tinental Press Service,

Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH COM-
PANY, a corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW UPON REFUSING TO ISSUE
INTERLOCUTORY INJUNCTION; ORDER
DENYING INJUNCTION AND RESTORA-
TION OF SERVICE; AND ORDER VACAT-
ING THE TEMPORARY RESTRAINING
ORDER AND ORDER DIRECTING RES-
TORATION OF SERVICE HERETOFORE
ISSUED

The court, on the 2nd day of April, 1948, made its order in the above entitled matter, enjoining and restraining The Western Union Telegraph Company, a corporation, defendant above named, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with it, from refusing to furnish plaintiff with interstate Morse wire service between plaintiff and its customer, Consolidated Publishing Company of Los Angeles, California, directing defendant to re-

store such services heretofore discontinued from the date of the service of said order until the further order of the court, and directing the defendant to show cause on the 30th day of April, 1948, at 10 o'clock a.m. why a [77] preliminary injunction should not issue enjoining said defendant from refusing to furnish interstate Morse wire service between plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California, or why temporary mandatory order pending the trial of the cause should not issue directing defendant to restore such services except in accordance with the order of the court.

The court, by consent of the parties, continued the hearing upon said order to show cause from April 30, 1948, at 10 o'clock a.m., until May 5, 1948.

Defendant, responsive to said order to show cause, having filed herein and served upon the plaintiff its verified answer to the complaint and the affidavit of J. W. Inwood, the matter came on regularly to be heard on said May 5, 1948, at 10 o'clock a.m., upon the complaint and the affidavits of Edward J. McBride and Harold V. Belden, filed by plaintiff, and the answer and said affidavit of J. W. Inwood, filed on behalf of defendant, and the court now sets forth its findings of fact and conclusions of law, which constitute the grounds of its action as hereinafter stated, as follows:

I.

Plaintiff is and at all times in the complaint

mentioned was a citizen and resident of the State of Ohio.

II.

Defendant, The Western Union Telegraph Company, is and at all times since prior to the year 1872 has been a corporation organized and existing under the laws of the State of New York for the purpose of maintaining and operating a general public utility, intrastate and interstate telegraph system and business throughout the United States, including the State of California.

III.

Continuously since its organization defendant has maintained and operated and continues to maintain and operate an interstate [78] telegraph system and service throughout the United States, including the State of California, which system has also throughout said time maintained intrastate telegraph service throughout California.

IV.

The amount involved in this controversy exceeds Three Thousand Dollars, exclusive of interest and costs.

V.

Defendant, for lack of information and belief with reference thereto, denies the allegations of Paragraph IV of the complaint as to the nature of plaintiff's business; on the same ground denies the allegations of said paragraph with reference to the transmission of news of sporting events by the use

of a Morse wire furnished by defendant to plaintiff's customers in Florida, New York, Oregon or intermediate states, or into Canada or Mexico; and on the same ground denies the allegation of said paragraph that plaintiff's customers receive or have received sporting or racing news service or any news service by direct or other connection with the main or other interstate, or Morse wire, or any wire belonging to or operated by defendant.

VI.

The telegraph facilities and service furnished by defendant to plaintiff referred to in the complaint were and are known and described as "leased facilities," and have been so furnished as follows, and not otherwise:

(a) On March 31, 1941, and at all times thereafter, Federal Communications Commission Tariff No. 219 governed and controlled and continues to govern and control the operations, service and conduct of defendants in the leasing of its interstate public utility communications facilities and services; throughout said [79] time said Tariff No. 219 (so far as pertinent hereto) has provided and required, and continues to provide and require as follows:

"The Western Union Telegraph Company—Tariff F.C.C. No 219—Original Page 7.

LEASED FACILITIES

"(8) The service: Leased Facility service as covered in this tariff consists of furnishing for the

private use of customers, facilities for transmitting electrical signals between specified points. * * *

“Facilities furnished under this tariff may be employed only for the private use of those companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives and each such office shall transmit and receive its particular communications over the equipment installed therein. Further, such facilities shall not be used either directly or indirectly for the handling of communications for the public or any person, firm or corporation other than those whose offices are connected to the circuits or their affiliated and subsidiary companies and their representatives. * * *

“Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law”;

At all times since March 31, 1941, said Federal Communications [80] Commission Tariff No. 219 and Tariff Sheets Nos. 1399T and 1400T, prescribed by the California Public Utilities Commission, have contained, and still contain, the following identical language governing the public utility

facilities and services furnished to plaintiff by defendant herein referred to:

“In view of the fact that the subscriber has exclusive control of his communications over the facilities furnished him by the Telegraph Company, and of the other uses for which facilities may be furnished him by the Telegraph Company, and because of unavoidableness of errors incident to the services and to the use of such facilities of the Telegraph Company, the services and facilities furnished by the Telegraph Company are subject to the terms, conditions and limitations herein specified and to such particular terms, conditions and limitations as are set out in the schedules applicable to particular services and facilities”;

(b) On or about May 19, 1945, Continental Press Service (being the name under which plaintiff was at the time doing and continues to do business) applied in writing to defendant at defendant's general offices, No. 60 Hudson Street, New York City, New York, that defendant lease to said Continental Press Service telegraph facilities, consisting of a Morse operated private telegraph line from the City of Chicago, Illinois, to the City of Seattle, Washington, by way of Los Angeles and San Francisco, California, and Portland, Oregon, and intermediate cities, with Morse telegraph instruments (known as and called “drops”) connected with said private telegraph line at said terminals and at various points in the several states traversed by said line, including points in California. In said

application plaintiff agreed and stipulated as follows: [81]

“The undersigned requests The Western Union Telegraph Company to furnish, subject to and in accordance with its lawful rates and regulations, the service described (including such modifications therein as may be ordered from time to time), for the established minimum period and thereafter until terminated by written notice from the undersigned, unless earlier terminated by the Company pursuant to its regulations, and agrees to pay for such service according to the Company’s established billing practices. The undersigned agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law. This application shall become binding on both parties when accepted by the Company, such acceptance to be evidenced by the signature of one of its officers hereon, or by the establishment of the service”;

Said application did not state that the facilities and service applied for or any part thereof were to be used for any particular purpose, nor did it state that the facilities or service so applied for

were to be used to supply plaintiff's customers or anyone else with sporting or racing news; on the contrary, said application contained no statement as to the nature or the use intended to be made of telegraphic communications which plaintiff or anyone else intended to transmit by means of said facilities and service; [82]

(c) Defendant accepted said application at its said New York office on or about said 19th day of May, 1945, and pursuant thereto and in accordance with the tariffs, schedules, rules, regulations and orders prescribed by the Federal Communications Commission, leased to plaintiff a private telegraph wire or channel for telegraph communication from Chicago, Illinois, by way of Los Angeles, San Francisco, Portland, Oregon, and intermediate cities in the several states traversed by said wire to Seattle, Washington, with connected wires or channels (commonly called "drops") extending from said private leased wire or channel at various points and places in the states traversed by said line, including the places in California hereinafter mentioned; at the respective terminals of said private wire or channel and at each such drop therefrom, including said drops in California, the facilities and service so leased to plaintiff included a Morse telegraph instrument;

(d) On March 4, 1948, and for a long time prior thereto and continuously thereafter until the discontinuances hereinafter mentioned, drops, including at each drop a Morse telegraph instrument as

a part thereof, were maintained as a part of said leased private telegraph line facilities at each of the following places in California:

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Springs,
Room 211, Platt Building, San Bernardino,
362 D Street, San Bernardino,
208 West Eighth Street, Los Angeles,
615 North La Brea, Los Angeles,
919 Fourth Avenue, San Diego;

(e) Each of said drops was so maintained and operated [83] as that any message initiated thereat could be and was immediately transmitted to all other drops connected with said leased line in the various states traversed by said line, including all of said drops connected with said leased line in California;

(f) Neither the premises at the terminals of said leased line nor at any place where any such telegraph instrument or drop was connected with said leased wire were under any control of defendant; all attendants and employees, including the telegraph operator, at each such drop and at all other places on said leased wire, were at all times employed by, and were under the exclusive control of, plaintiff, and defendant had nothing to do either with the employment or the services of any of such attendants or employees or of anyone engaged in or concerned with the transmission of messages or communications over or by means of said leased

facilities or with any such message or communication;

The telegraph facilities and service leased to plaintiff were, as required by said F.C.C. Tariff 219, for the private use of plaintiff and plaintiff's affiliated subsidiary companies, and plaintiff has at all times had exclusive control of the operation and use of said leased facilities and of all communications and messages transmitted over and by means thereof:

Defendant has never policed, monitored or otherwise supervised or observed the use of said facilities or been acquainted with any communications transmitted by means thereof; defendant has not been informed of any such communication or its contents, or of the use made of said facilities otherwise than by the letters from law enforcement officers of Kern County, California, of March 4, 1948, and from the Attorney General of the State of California of March 31, 1948, and by the proceedings before and decision and [84] order of the California Public Utilities Commission referred to in said letter of the Attorney General, which letters, decision and order are made a part of defendant's answer herein and marked Exhibits A, B and C, and are here referred to for particulars;

Defendant's sole contact with said leased facilities during said lease was and has been for the purpose of keeping the same in working order.

VII.

Defendant did not, on April 2, 1948, or at any

other time or at all, wrongfully, or arbitrarily, or without just cause, discontinue the facilities or service leased by it to plaintiff; on the contrary, the facts as to such discontinuance are as follows, and not otherwise:

At a time prior to February 18, 1948, the California Public Utilities Commission initiated a certain proceeding before said Commission entitled, "Case No. 4930; Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest";

Defendant was notified by said Commission of said proceedings and appeared at the hearings had in the course thereof;

Throughout the pendency of said proceedings Honorable Fred N. Howser was, and still is, the Attorney General and chief law enforcement officer of the State of California, and as such appeared in said proceeding before said Commission;

Also appearing in and represented throughout said proceedings before said Commission were the Chief Investigator of the Special Crime Study Commission on Organized Crime for the State of California, [85] and the State Commission on Organized Crime:

Hearing was had and testimony taken before said Commission in said proceeding on February

18, 19, 25, 26 and March 10, 1948, and said Commission rendered its decision and made its order therein on April 6, 1948. Said decision and order are attached to and made a part of defendant's answer herein, marked Exhibit A, and are here referred to for particulars;

During the pendency of said proceeding before said California Utilities Commission, and on March 4, 1948, defendant received at its office at 1605 19th Street, Bakersfield, California, letter signed by Tom Scott, as District Attorney of Kern County, California, by J. E. Loustalot, as Sheriff of said County (said persons being law enforcement officers of Kern County, California), and by H. V. Grayson, as Chief of Police of the City of Bakersfield (said person being law enforcement officer of the City of Bakersfield, in said county) notifying defendant that the latter's telegraph instrument and wire located at 1911 Edison Highway, Bakersfield, Kern County, California (being part of the private telegraph line facilities leased by defendant to plaintiff doing business as Continental Press Service as aforesaid), had been and were on March 4, 1948, being used "to aid, assist and carry on the business of illegal bookmaking by several known illegal bookmakers in Kern County, and by James Mellow, alias James Monroe, or the person who used said telegraph machine or wire at said address on Edison Highway," and to violate sections 182 and 337a of the Penal Code of California;

On March 31, 1948, defendants received from

said Honorable Fred N. Howser, as Attorney General and chief law enforcement officer of California, letter notifying defendant that its facilities and services (being part of the private line telegraph facilities [86] leased by defendant to plaintiff) at the following addresses:

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Springs,
Room 211, Platt Building, San Bernardino,
362 D Street, San Bernardino,
208 West Eighth Street, Los Angeles,
615 North La Brea, Los Angeles,
919 Fourth Avenue, San Diego,

were being used to furnish information to bookmakers in violation of section 337a of the Penal Code of California. In said letter said Attorney General "as chief law enforcement officer of this state" demanded that defendant immediately discontinue the leasing of its facilities and service to plaintiff in California;

Copies of the respective letters from the District Attorney and Sheriff of Kern County and the Chief of Police of Bakersfield, and from said Attorney General to defendant are attached to and made a part of the answer herein and marked Exhibits B and C, respectively. They are here referred to for further particulars;

Immediately following receipt of said letters, defendant informed plaintiff of the receipt thereof and of its intention to comply with the demands therein made;

On April 2, 1948, pursuant to and because of the statements and representations made in said two letters last above referred to, defendant discontinued the facilities and service so leased by it to plaintiff at the places and points specified in said letters and immediately informed plaintiff of such discontinuance;

April 6, 1948, prior to the commencement of this action, said California Public Utilities Commission rendered its decision and made its order in said Case No. 4930, stating, among other things, that from the testimony produced at the hearings in said case it found that the defendant's facilities leased to plaintiff were being [87] used by the Consolidated Publishing Company and other persons for illegal purposes. Said decision and order are attached to and made a part of defendant's answer herein and marked Exhibit A, and are here referred to for further particulars;

Copy of said decision and order was caused by said Commission to be transmitted to and was received by defendant.

VIII.

Defendant is now and at all times has been ready and willing to furnish facilities and services to plaintiff and to all other persons in accordance with the tariffs, rules and regulations of the Federal Communications Commission and of the California Public Utilities Commission in such manner as not, by means of such facilities and service, to violate any law of the United States or of the State of California, or of any other state.

IX.

Defendant has not refused to provide interstate Morse wire or any other of its public utility facilities to plaintiff; on the contrary it is now and at all times has been ready and willing to furnish its public utility facilities and service to plaintiff and to all other persons in accordance with the tariffs, rules and regulations of the Federal Communications Commission and of the California Public Utilities Commission, in such manner, however, as not, by means of such facilities and services, to violate or to aid and abet the violation of any law of the United States or of the State of California, or of any other state.

X.

It is not true that the refusal and failure of defendant to supply plaintiff with interstate Morse wire or other public utility facilities has caused or will cause plaintiff irreparable damage. [88]

XI.

No application has been made by plaintiff to the Federal Communications Commission to change, modify or abolish the provisions of said Commission's Tariff No. 219, set forth in defendant's answer and in the affidavit of J. W. Inwood, or for any relief against defendant by said Commission for or on account of any of the acts complained of in the complaint herein.

XII.

Plaintiff has not applied to the California Public Utilities Commission to change, modify or abolish Tariffs 1399T and 1400T, prescribed by said Com-

mission, or to change, modify or rescind the decision or order of said Commission of April 6, 1948, or for any relief against defendant by said Commission for or on account of any of the acts complained of in the complaint herein.

XIII.

It is not true that plaintiff has no adequate remedy at law; on the contrary, plaintiff has, and at all times has had, the right and privilege of applying to the Federal Communications Commission to change, modify or abolish the provisions of said Tariff No. 219 hereinabove referred to, under and pursuant to which defendant's facilities and service were discontinued as aforesaid, and to compel defendant to render and provide its public utility services to plaintiff in all respects as required by law;

Plaintiff has at all times had the right and privilege of applying to the California Public Utilities Commission to change, modify or abolish said Tariffs 1399T and 1400T and said order of April 6, 1948, if either said tariff or said order is unreasonable or if plaintiff is aggrieved thereby; and to compel defendant to render and provide its public utility intrastate services to plaintiff in all respects as required by law. [89]

XIV.

It is not true that defendant has in any manner or at all prevented plaintiff from receiving any service from defendant either in interstate or foreign communication or otherwise or at all by wire or otherwise at the same charges and upon the

terms and conditions as favorable as the charges, terms and conditions given by defendant for like communication under similar conditions to any other person.

XV.

There is and has been no application by the Attorney General of the United States or request to the Federal Communications Commission for the filing of this or any other action, nor is there any allegation by either said Attorney General or said Commission of failure by defendant to comply with, or that defendant has violated any of the provisions of Chapter 5, Subchapter IV, sections 401 and 406, Title 47, of the United States Code, and this action was commenced and is being maintained without any such application or request. [90]

Upon the foregoing findings of fact, the court states its conclusions of law as follows:

1. The telegraph system of The Western Union Telegraph Company, a telegraph corporation, is, and at all the times mentioned in the complaint has been subject to the plenary control and regulation of the Federal Communications Commission as to its interstate operations, business and service, and subject to like plenary control and regulation of the California Public Utilities Commission as to its intrastate operations, business and service in the State of California;

2. At all of the times mentioned in the complaint, Federal Communications Commission Tariff No. 219 has reserved and continues to reserve to defendant the right to discontinue its service to any

drop or connection or to all drops and connections whenever defendant receives notice from federal or state law enforcing agencies that such service is being supplied contrary to law;

3. At all of the times mentioned in the complaint it was agreed by plaintiff that the facilities leased to him by defendant would not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of the State of California, and that defendant is at liberty to discontinue the service to any drop or connection or to all drops and connections so leased, on receipt by defendant from federal or state law enforcing agencies of notice that the facilities so leased are being used contrary to law. Said agreement is still in force and effect;

4. On March 4 and March 31, 1948, and on April 6, 1948, defendant received notices from the law enforcing agencies of the State of California, to-wit, the District Attorney and Sheriff of Kern County and the Chief of Police of Bakersfield, California, the [91] Attorney General and the Public Utilities Commission of said State, that the "drops" or connections and services included in defendant's lease to plaintiff at the following addresses:

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Springs,
Room 211, Platt Building, San Bernardino,
362 D Street, San Bernardino,

208 West Eighth Street, Los Angeles,
615 North La Brea, Los Angeles,
919 Fourth Avenue, San Diego,

were being used to violate and to aid and abet in the violation of the laws of the State of California;

5. Discontinuance by defendant of its facilities and services complained of herein was by reason of said notices from said law enforcing agencies and pursuant to and in accordance with the provisions of Federal Communications Commission Tariff No. 219, and the agreement between plaintiff and defendant, and was lawful;

6. Plaintiff has not applied to either the Federal Communications Commission or to the California Public Utilities Commission for any action or relief by either of said Commissions against defendant for or on account of any of the matters alleged in the complaint herein;

7. No application of the Attorney General of the United States, either at the request of the Federal Communications Commission or otherwise has been made herein to this court or otherwise or at all, alleging any failure of defendant to comply with any provision of Chapter 5, Title 47 of the United States Code;

8. This action was not commenced nor is it being maintained upon the relation of any person alleging any violation by [92] defendant of any

provision of said Chapter 5, Title 47 of the United States Code which prevents any such relator from receiving defendant's service in interstate or foreign communication by wire at the same charges or upon terms and conditions as favorable as those given by defendant for like communication or transmission under similar conditions to any other person;

9. Plaintiff is not entitled to preliminary injunction herein;

10. Plaintiff is not entitled to mandatory or any order that said leased facilities and service be restored;

11. Plaintiff is not entitled to have the temporary restraining order heretofore issued continued in force;

12. Plaintiff is not entitled to maintain this action. [93]

It Is, Therefore, Ordered:

That the temporary restraining order and the order directing restoration of service heretofore issued be and the same are hereby vacated and set aside;

That the request for preliminary injunction be and the same is hereby denied;

That the request for temporary or other mandatory order directing restoration of defendant's fa-

cilities and service pending the further order of the court be and the same is hereby denied.

Exception is allowed to plaintiff.

May 24, 1948.

/s/ J. E. F. O'CONNOR,
District Judge.

Dated: May 21st, 1948. 2:40 p.m.

The foregoing findings, conclusions of law, and order are approved as to form.

/s/ CHARLES H. CARR,
Attorney for Plaintiff.
By F. A. E. BLOCK.

Judgment entered May 24, 1948. Docketed May 24, 1948. J Book 50, Page 766.

EDMUND L. SMITH,
Clerk.
By /s/ J. MASON,
Deputy.

[Endorsed]: Filed June 3, 1948. [94]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Edward J. McBride, doing business as Continental Press Service, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order denying the request for a preliminary in-

junction and for a mandatory order directing restoration of defendant's interstate Morse wire service between plaintiff and the Consolidated Publishing Company of Los Angeles, California.

Entered in this action on the 24th day of May, 1948.

/s/ CHARLES H. CARR,
Attorney for Appellant.

[Endorsed]: Filed June 3, 1948. [95]

[Title of District Court and Cause.]

DESIGNATION OF PARTS OF THE RECORD
NECESSARY FOR CONSIDERATION OF
POINTS ON WHICH APPELLANT IN-
TENDS TO RELY ON THE APPEAL

Appellant, Edward J. McBride, doing business as Continental Press Service, herewith designates the parts of the record which he thinks necessary for the consideration of the points on which he intends to rely on this appeal, namely:

1. Complaint.
2. Affidavit of Edward J. McBride in support of Complaint.
3. Affidavit of Harold V. Belden in support of Complaint.
4. Answer.
5. Order to Show Cause and Temporary Restraining Order of April 22, 1948. (Do not print Points and Authorities in support of Order to Show Cause.)

6. Affidavit of J. W. Inwood responsive to Order to [96] Show Cause and Temporary Restraining Order.

7. Minute Order of May 5, 1948—denying Preliminary Injunction and Mandatory Relief.

8. Findings of Fact and Conclusions of Law, Order denying Interlocutory Injunction and vacating Temporary Restraining Order and the Order Directing Restoration of Services—May 24, 1948.

9. Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit.

10. Statement of Points on which Appellant Intends to Rely on Appeal.

11. Designation of Parts of the Record necessary for Consideration of Points on which Appellant Intends to Rely on the Appeal.

/s/ CHARLES H. CARR,
Attorney for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 15, 1948. [97]

In the District Court of the United States,
Southern District of California,
Central Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 98, inclusive, contain

full, true and correct copies of Complaint; Affidavits of Harold V. Belden and Edward J. McBride; Order to Show Cause and Temporary Restraining Order; Affidavit of J. W. Inwood; Answer; Minute Order Entered May 5, 1948; Findings of Fact and Conclusions of Law upon Refusing to Issue Interlocutory Injunction; Order Denying Injunction and Restoration of Service and Order Vacating the Temporary Restraining Order and Order Directing Restoration of Service heretofore issued; Notice of Appeal and Designation of Record on Appeal which constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$25.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 7th day of July, A. D. 1948.

(Seal) EDMUND L. SMITH,
Clerk.

By /s/ Theodore Hocke,
Chief Deputy.

[Endorsed]: No. 11969. United States Circuit Court of Appeals for the Ninth Circuit. Edward J. McBride, doing business as Continental Press Service, Appellant, vs. The Western Union Telegraph Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed July 8, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11969

EDWARD J. McBRIDE, doing business
as CONTINENTAL PRESS SERVICE,
Appellant,

vs.

THE WESTERN UNION TELEGRAPH
COMPANY, a corporation,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY
ON APPEAL

Appellant, Edward J. McBride, doing business
as Continental Press Service, herewith sets forth

a concise statement of the points on which he intends to rely on this appeal, viz.:

I.

The District Court erred in denying plaintiff's request for a preliminary injunction.

II.

The District Court erred in denying plaintiff mandatory relief prayed for in the Complaint.

III.

The findings of fact made by the District Court are inconsistent with and are not supported by the pleadings and record in the case.

IV.

The District Court erred in holding that plaintiff was not entitled to maintain this action.

/s/ CHARLES H. CARR,
Attorney for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed July 14, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF THE RECORD
NECESSARY FOR CONSIDERATION OF
POINTS ON WHICH APPELLANT IN-
TENDS TO RELY ON THE APPEAL

Appellant, Edward J. McBride, doing business as Continental Press Service, herewith designates the parts of the record which he thinks necessary for the consideration of the points on which he intends to rely on this appeal, namely:

I.

The entire transcript as certified to you by the Clerk of the District Court.

II.

Statement of points on which appellant intends to rely on appeal filed with the Clerk of this Court.

III.

Designation of parts of the record necessary for consideration of points on which appellant intends to rely on the appeal filed with the Clerk of this Court.

/s/ CHARLES H. CARR,
Attorney for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed July 14, 1948. Paul P. O'Brien, Clerk.

No. 11969

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD J. McBRIDE, doing business as CONTINENTAL
PRESS SERVICE,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corpo-
ration,

Appellee.

APPELLANT'S OPENING BRIEF.

CHARLES H. CARR,

675 Subway Terminal Building, Los Angeles 13,

Attorney for Appellant.

FILED

SEP 26 1948

PAUL P. O'BRIEN

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No. 11969

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD J. McBRIDE, doing business as CONTINENTAL
PRESS SERVICE,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corpo-
ration,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from the Order and Judgment of the United States District Court for the Southern District of California, Central Division, by the Honorable J. F. T. O'Connor, United States District Judge, denying Appellant's request for a preliminary injunction and for an order directing Appellee to restore interstate Morse wire service between Appellant and the Consolidated Publishing Company of Los Angeles, California, entered May 24, 1948 [R. 78-99].

The jurisdiction of the District Court was based upon 28 U. S. C. A. §41 (1) (Diversity of citizenship and matter in controversy exceeding \$3,000.00); F. R. C. P.

Rule 65 (Injunctive relief); and §406 of the Communications Act of 1934, as amended, 47 U. S. C. A., §406 (Mandamus).

This Court has jurisdiction to entertain this appeal from the denial of the preliminary injunction under the provisions of Sections 128 and 129 of the Judicial Code, as amended, 28 U. S. C. A., §§225 and 227.

The order and judgment of the District Court that Appellant is not entitled to maintain this action is a final decision and appealable to this Court under §128 of the Judicial Code, 28 U. S. C. A., §225.

Meehan v. Valentine, 145 U. S. 611, 36 L. Ed. 835;

Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. Ed. 55;

Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 66 L. Ed. 144;

Modin v. Matson Nav. Co. (9 Cir.), 128 F. (2d) 194.

Also, an order denying relief by way of mandamus is a final order.

Davies v. Corbin, 112 U. S. 36, 28 L. Ed. 627;

Hartman v. Greenhow, 102 U. S. 672, 26 L. Ed. 271.

Statement of the Case.

Appellant filed a Complaint in the District Court for the Southern District of California on April 22, 1948, alleging two causes of action—the first asserting a right to an order directing Appellee, The Western Union Telegraph Company, to restore Appellant's interstate Morse wire service between Appellant and the Consolidated Publishing Company (sometimes hereinafter referred to as "Consolidated"), of Los Angeles, California, under the provisions of §406 of the Communications Act of 1934, as amended, 47 U. S. C. A., §406; and the second asserting a right to a preliminary and permanent injunction restraining and enjoining Appellee from refusing to furnish Appellant said service [R. 2-12].

On April 22, 1948, an Order to Show Cause and Temporary Restraining Order was signed by the Judge of the District Court whereby Appellee was enjoined from refusing to furnish Appellant with the interstate Morse wire service between Appellant and its customer, Consolidated, and a hearing on the Order to Show Cause was set for the 30th day of April, 1948 [R. 20-22].

Two affidavits were filed on behalf of Appellant in support of the Order to Show Cause why a mandatory order should not be granted restoring the interstate Morse wire service between Appellant and its customer, Consolidated, or why a preliminary injunction should not issue enjoining Appellee from refusing to furnish such service [R. 13-17].

On May 5, 1948, Appellee filed its Answer and the affidavit of J. W. Inwood responsive to the Order to Show Cause and Temporary Restraining Order [R. 23-34]. The Order to Show Cause came on for hearing on May 5, 1948, and the District Court ordered that the temporary restraining order be vacated; the request for the preliminary injunction be denied, and that the mandatory order requested by Appellant be likewise denied [R. 77].

On May 21, 1948, Appellee filed proposed findings of fact and conclusions of law which were signed by the Judge of the District Court on May 24, 1948. Judgment was entered and docketed on May 24, 1948 [R. 78-98].

The District Court concluded, as a matter of law, among other things, that Appellant was not entitled to a preliminary injunction or to a mandatory or any order that said leased facilities be restored, and that Appellant was not entitled to maintain the action [R. 97].

In its Findings of Fact the Court also, among other things, found that it was not true that the refusal and failure of Appellee to supply Appellant with interstate Morse wire facilities had caused or would cause Appellant irreparable damage [R. 92].

On June 3, 1948, Appellant filed Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit from the order of the District Court denying the request for a preliminary injunction and for a mandatory order directing restoration of Appellant's interstate Morse wire service [R. 98].

Summary of the Facts.

There is no dispute between the parties as to the facts, and they are set forth in the pleadings and supporting affidavits.

Appellant, an individual doing business under the fictitious name and style of Continental Press Service (sometimes hereinafter referred to as "Continental Press"), is engaged in the business of disseminating general news, including sporting and racing news, over the interstate and foreign Morse wire facilities of Appellee, The Western Union Telegraph Company. Appellant's principal office is located in Cleveland, Ohio, and two other offices are located in Chicago, Illinois, and New York, New York. Appellant receives news of all types, including sporting and racing news, from throughout the North American continent, which it transmits over interstate Morse wire facilities leased from Appellee to its offices in Chicago. From its Chicago office the news is sent over interstate Morse wires leased from Appellee to customers throughout the United States, Canada and Mexico, among which are newspapers, radio stations and daily racing publications, usually referred to as "scratch sheets" [R. 17].

When Appellant accepts a new customer, it arranges for Appellee to connect that customer on to the interstate Morse wire, and, in case of a discontinuance, arrangement is made to disconnect the wire facilities to that particular customer. The transcontinental wire, which is leased from Appellee, passes through California and is used solely for the transmission of Appellant's news throughout the various states and into Canada and Mexico, and the transmission of news thereon continues irrespective of the number of customers connected or disconnected in California or elsewhere [R. 18].

The main interstate Morse wire in question, which is leased by Appellant from Appellee, at the present time crosses almost every state in the Union, including California, and extends into Canada and Mexico [R. 18].

General news and sporting news, other than racing news, constitutes from thirty to fifty per cent of the news furnished by Appellant to its customers. Those customers are free to distribute the news received from Appellant in any manner or fashion they desire. Charges for such news service are based upon area, population and other similar factors, and Appellant does not have any proprietorship or ownership interest in the business of its customers [R. 19].

The Consolidated Publishing Company of Los Angeles, California, is a customer of Appellant, and, prior to April 2, 1948, received, by direct connection with the leased interstate line of Appellant, all types of news, including sporting and racing news, for which it paid Appellant approximately five hundred (\$500.00) dollars a week [R. 19].

Consolidated Publishing Company is engaged in the business of disseminating sporting news, principally racing news, by means of daily and weekly publications which it prints in its own plant located at 615 North La Brea Avenue, Los Angeles, California. Consolidated prints and publishes the following daily racing news sheets, commonly referred to as "scratch sheets": Metropolitan Scratch Sheet, Reporter Scratch Sheet and Blue Sheet. A morning and an afternoon edition is printed each day except Sunday of the Metropolitan Scratch Sheet and Reporter Scratch Sheet. The Blue Sheet is printed once daily except Sunday. Each week Consolidated sells approximately 100,000 daily scratch sheets [R. 13]. In

addition, Consolidated publishes two weekly sporting papers, the Reporter Weekly and the Hollywood Observer, which are issued on Friday and have a circulation of 2,800 copies per week [R. 14].

Consolidated conducts its operations at the address on La Brea Avenue, and at such place maintains both its offices and printing presses. The real estate is under lease and has an additional two years to run. The printing presses and other equipment owned by Consolidated and used to conduct its business are presently valued at approximately \$100,000. It has approximately 65 employees and maintains the usual business offices with books and records to reflect its social security program, unemployment insurance, withholding taxes, State and Federal income taxes, city license taxes and various other data necessary to the usual conduct of a business. The Company also has union contracts which obligate the company to provide severance and accumulated vacation pay [R. 14].

Consolidated's publications are sold throughout the State of California and in Nevada. Metropolitan Scratch Sheet is admitted to second-class mailing privileges [R. 14].

The publications of Consolidated are distributed in Los Angeles by means of route men in a manner similar to that employed by metropolitan newspapers. Each day a route carrier would call upon a newsstand operator and deliver the number of scratch sheets requested by the news dealer. The following day when the route man called, he would be paid for the scratch sheets delivered the previous day but would allow credit to the newsstand operator for those remaining unsold. Consolidated had no proprietary interest in the newsstands and the relationship was solely that of seller and buyer [R. 15].

In order to develop its circulation, Consolidated carried in each issue of its publication an advertisement in which

telephone numbers were listed so that the public might call Consolidated's offices for the purpose of obtaining racing results—this practice being identical with that furnished by its competitor in Los Angeles, the National Scratch Sheet [R. 15].

On April 2, 1948, Appellee interrupted and discontinued the news service by which Appellant supplied news to Consolidated over the interstate Morse wire facilities. Consolidated desires the restoration of this news service, and is ready, willing and able to continue to purchase news from Appellant [R. 16].

The discontinuance of the news service between Appellant and Consolidated arose from a series of events beginning with an investigation by the Public Utilities Commission of California.

Some time prior to February 18, 1948, the Public Utilities Commission of the State of California instituted a proceeding before said Commission entitled "Case No. 4930—Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest." Hearings were held on four occasions in February, 1948, and on one occasion in March, 1948, and the Commission ordered that any communications utility operating under the jurisdiction of the Commission must discontinue and disconnect service to a subscriber whenever it had reasonable cause to believe that the use made or to be made of the service was prohibited by law or was being used to violate or to aid and abet the violation of the law. The order further provided that a written notice to such utility from any official charged with the enforcement of the law stating that such service

was being so used was sufficient to constitute such reasonable cause [R. 56-70].

On March 31, 1948, Fred N. Howser, the Attorney General of California, addressed a letter to Appellee in which attention was directed to the hearings before the Public Utilities Commission. In the letter it was stated that the hearings indicated (without specifying in what manner) Appellee had leased wires to Appellant which were engaged in furnishing information to bookmakers in violation of the Penal Code of the State of California at various addresses, one of which was 615 North La Brea Avenue, Los Angeles, the address of Consolidated Publishing Company. The letter then demanded that Appellee immediately discontinue the leasing of any and all equipment to the Appellant, Continental Press Service in California [R. 73-75].

The Attorney General did not supply Appellee with any facts indicating that Appellant or its customer, Consolidated, was violating any law of the State of California or of the United States [R. 35].

Appellee had no knowledge or information as to the type of news being disseminated by Appellant and received by its customer, Consolidated, and had no knowledge or information concerning the manner or method of operation of the business of Appellant or its customer, Consolidated [Para. 4 and 7, Appellee's Answer, R. 38, 49, 50].

However, on April 2, 1948, pursuant to the order of the Public Utilities Commission of the State of California and the letter of the Attorney General, Appellee discontinued the wire service between Appellant and its customer, Consolidated Publishing Company [R. 48].

Appellant thereafter instituted this suit to compel restoration of its leased Morse interstate wire [R. 2].

SPECIFICATIONS OF ERROR.

I.

The District Court Erred in Its Twelfth Conclusion of Law That Appellant Is Not Entitled to Maintain This Action.

A. Communication of Appellant's news over wire facilities between states is interstate commerce.

B. By the Federal Communications Act of 1934 and earlier acts, Congress brought the field of interstate wire communications under exclusive Federal control.

C. Appellant's Complaint states a cause of action under the Communications Act which entitles Appellant to relief in the District Court.

II.

The District Court Erred in Its Sixth Conclusion of Law Requiring Appellant to Resort to Either the Federal Communications Commission or the California Public Utilities Commission for Any Action or Relief.

A. It was error for the District Court to require Appellant to seek relief from the Federal Communications Commission since the issue is not the reasonableness of Tariff Regulation No. 219 but whether Appellant can compel restoration of service improperly denied him.

B. The District Court erred in requiring Appellant to resort to the California Public Utilities Commission for any action or relief, since that Commission has no jurisdiction over interstate commerce.

III.

The District Court Erred in Its Tenth Conclusion of Law That Appellant Is Not Entitled to Any Order Compelling Restoration of His Service.

A. Distribution of racing news does not directly or indirectly violate any federal or state law and is recognized in California as a legitimate business.

B. Under the Rules of Decision Act and *Erie v. Tompkins* doctrine, the District Court was bound to follow the decision of the State Court in the *Brophy* case which upheld the legality of disseminating racing news.

C. Where a utility company is asked to restore service, it must exercise independent judgment as to whether customer is violating the law and may not rely on unsubstantiated statements of law enforcement officers.

IV.

The District Court Erred in Its Seventh and Eighth Conclusions of Law Requiring (a) That the Attorney General of the United States Make Application to Said Court Alleging a Violation of the Communications Act and (b) That the Mandamus Action Be Maintained Upon the Relation of a Person Alleging a Violation of Said Act.

V.

The District Court's Finding of Fact That Appellant Does Not Show Irreparable Damage Is Not Supported by the Record; and the Court Further Erred in Denying Appellant's Request for a Preliminary Injunction.

ARGUMENT.

SPECIFICATION OF ERROR I.

The District Court Erred in Its Twelfth Conclusion of Law That Appellant Is Not Entitled to Maintain This Action.

A. Communication of Appellant's News Over Wire Facilities Between States Is Interstate Commerce.

Appellant is engaged in the business of disseminating general news, including sporting and racing news, over the interstate and foreign Morse wire facilities of The Western Union Telegraph Company. The news is received from throughout the North American continent and is transmitted by Appellant over the facilities of Western Union to Appellant's office in Chicago, Illinois. From its Chicago office, the news is sent over the interstate Morse wires to customers throughout the United States, Canada and Mexico. Consolidated Publishing Company of Los Angeles, California, is a customer of Appellant and receives, by direct connection with Appellant's main interstate line, all types of news disseminated by Appellant, including sporting and racing news.

It could hardly be doubted that the transmission by Appellant of its news over the leased wire facilities of Western Union from Chicago, Illinois, to the Consolidated Publishing Company in Los Angeles, California, is interstate commerce, and that it continues as such until it reaches the offices of the Consolidated Publishing Company.

Under Article I, Section 8, Clause 3 of the United States Constitution, Congress is given the power to "regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." Chief Justice

Marshall, in *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23, interpreted the word "commerce," as used in the Constitution, to mean commercial intercourse in all its branches among the various states. The United States Supreme Court has held in a long series of decisions that interstate telegraph communication is within the protection of the commerce clause in the Federal Constitution.

Western U. Teleg. Co. v. Lenroot, 323 U. S. 490, 502, 89 L. Ed. 414, 423;

Western U. Teleg. Co. v. James, 162 U. S. 650, 654, 40 L. Ed. 1105, 1106;

Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 350, 30 L. Ed. 1187, 1188;

Western Union Telegraph Co. v. State of Texas, 105 U. S. 460, 26 L. Ed. 1067.

The Supreme Court, in *Western Union Telegraph Co. v. James*, *supra*, stated, at page 654:

"It has been settled by the adjudications of this court that telegraph lines, when extending through different states, are instruments of commerce which are protected by the above clause in the Federal Constitution, and that the messages passing over such lines from one state to another constitute a portion of commerce itself."

In the case of *Western Union Telegraph Co. v. State of Texas*, *supra*, the Court said, at page 461:

"A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects

different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.”

The Supreme Court ruled in *Western Union Tel. Co. v. Foster*, 247 U. S. 105, 62 L. Ed. 1006, that telegraphic transmission of quotations of the New York Stock Exchange to the Boston offices of telegraph companies from which they were transmitted by an operator to tickers in the offices of brokers within the state who subscribed for such service, did not lose its character as interstate commerce until it was completed in the brokers’ offices. Speaking for the Court, Justice Holmes said, at page 114:

“It is admitted that the transmission from New York to Massachusetts by the telegraph company was interstate commerce. If so, it continued such until it reached ‘the point where the parties originally intended that the movement should finally end.’ ”

B. By the Federal Communications Act of 1934 and Earlier Acts, Congress Brought the Field of Interstate Wire Communications Under Exclusive Federal Control.

The Federal Communications Act was passed by Congress in 1934 for the purpose of regulating wire and radio communication in interstate and foreign commerce, 47 U. S. C. A., §201 *et seq.* Prior to that Act, Congress, in the Interstate Commerce Act of 1910, had given regulatory power over interstate wire communication companies to the Interstate Commerce Commission.

The Federal Communications Act contemplates the regulation of interstate wire communication from its inception to its completion. It created the Federal Communications Commission to carry out the policy of the Act

and to exercise jurisdiction over common carriers engaged in wire and radio communication in interstate and foreign commerce. 47 U. S. C. A., §201 *et seq.*

In the report of the Committee on Interstate Commerce by Mr. Dill to the Senate on April 17, 1934, it was stated (Senate Report No. 781, 73d Congress, 2d Session, Calendar No. 830):

“The purpose of this bill is to create a communications Commission with regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable or radio * * *. Since 1910, the Interstate Commerce Commission has had some jurisdiction over telephone, telegraph and wireless common wires. Likewise, the Postmaster General has certain jurisdiction over these companies. There is a vital need for one commission with unified jurisdiction over all of these methods of communication.”

O'Brien v. Western Union Tel. Co. (1st Cir.), 113 F. (2d) 539, at page 541:

“Congress having occupied the field by enacting a fairly comprehensive scheme of regulation, it seems clear that questions relating to the duties, privileges and liabilities of telegraph companies in the transmission of interstate messages must be governed by uniform federal rules. This conclusion is fortified by decisions under the Interstate Commerce Act, 49 U. S. C. A., §1 *et seq.*, which was applicable to telegraph companies prior to the passage of the Communications Act of 1934.”

See, also, *United States v. American Telephone & Telegraph Co.* (D. C., N. Y.), 57 Fed. Supp. 451, *aff'd* 325 U. S. 837, 89 L. Ed. 1964.

Decisions under the Interstate Commerce Act, 49 U. S. C. A. §1 *et seq.*, show clearly that prior to the Federal Communications Act, Congress required national uniformity in the regulation of interstate telegraph and telephone service.

Western U. Teleg. Co. v. Boegli, 251 U. S. 315, 64 L. Ed. 281;

Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U. S. 27, 64 L. Ed. 118.

The Supreme Court, in *Western Union Teleg. Co. v. Boegli*, *supra*, declared, at page 316:

“* * * we are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, * * *”

Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., *supra*, at page 31:

“But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Commission * * * and by the numerous and conclusive opinions of state courts of last resort, which, in considering the Act of 1910

from various points of view, reached the conclusion that that act was an exertion by Congress of its authority to bring under Federal control the interstate business of telegraph companies, and therefore was an occupation of the field by Congress which excluded state action * * *” (Citations omitted.)

C. Appellant's Complaint States a Cause of Action Under the Communications Act Which Entitles Appellant to Relief in the District Court.

By §406 of the Communications Act, the District Courts of the United States are given jurisdiction by mandamus to compel restoration of interstate Morse wire service by a carrier subject to the Act where plaintiff alleges in his complaint violations of the Act by said carrier, 47 U. S. C. A. §406.

Section 406 of the Act provides as follows:

“The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the carrier for the service to be enforced by the writ

is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper pending the determination of the question of fact: *Provided further*, That the remedy hereby given by writ of mandamus shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this chapter."

It is specifically provided in the Act that every common carrier engaged in interstate communication by wire or radio must furnish such communication service to anyone who makes reasonable request for same. 47 U. S. C. A. §202(a). The Communications Act further provides in §202(a) that:

"It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in * * * facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

Since on or about the 19th day of May, 1945, Appellee, Western Union, has leased to Appellant a private telegraph wire or channel for telegraph communication from Chicago, Illinois, by way of Los Angeles, San Francisco, Portland, Oregon and intermediate cities in the several states traversed by said wire to Seattle, Washington with connected wires or channels extending from said private

leased wire or channel at various points and places in the states traversed by said line, including a connection to the Consolidated Publishing Company in Los Angeles, California. On April 2, 1948, the connection of Consolidated Publishing Company with Appellant's interstate Morse wire was terminated by Appellee.

Appellant here urges that it has a clear, legal right to the leased wire facility so withheld. As hereinabove noted, a telegraph company subject to the Communications Act cannot discriminate among its customers seeking private leased wires, but must make such private wires available to applicants with even-handed impartiality and cannot grant them to one patron and arbitrarily refuse them to another.

Postal Teleg.-Cable Co. v. Associated Press, 228 N. Y. 370, 127 N. E. 256;

N. Y. Telephone Co., P. U. R. 1932A 262;

Matter of Private Wire Contracts, 50 I. C. C. Report, 731, 756.

The Court, in the *Postal Telegraph-Cable Co.* case, *supra*, states at page 256, N. E.:

"An interstate telegraph company must offer private wires within the limits of capacity to those who need them with even-handed impartiality under Interstate Commerce Act, §1, subd. 3, and §§2, 3."

And, also at page 260, N. E.:

"In all that I have written, I have gone on the assumption that the plaintiff, when it made contracts for private wires, was acting as a common carrier within the definition of the act of Congress, and was subject to the duties inhering in that relation. * * * Private wires have become an important branch of

the telegraph business. They are given, not only to the press, but to bankers and brokers and many others. * * * They must be offered to those who need them with even-handed impartiality. A public service corporation is not at liberty to grant extraordinary facilities to one man, and arbitrarily refuse them to another. It need not depart from the beaten track at all. If it does, it must not govern the deviation by prejudice or favor. What it grants to one, it must, in like conditions, when detriment would follow preference grant impartially to all, within the limits of capacity."

It was said in *N. Y. Telephone Co., supra*, that it is the duty of a telephone company which holds itself out to render leased wire service to furnish such service to a broadcasting station. The Court said, at page 268:

"The question here presented, however, goes far beyond reasonable rules and regulations. It goes to the very essence of the business and to the question of who shall be served by the company. In effect, the company claims the right to say what part of its business it will elect to do. If the company has no legal right to do a 'leased-wire' business, it must stop doing such business with those who have already applied and to whom it has granted these facilities. If this is a legal part of its business, it must come under regulation and the company must serve all who apply under proper conditions for service."

Matter of Private Wire Contracts, 50 I. C. C. Report 731, at page 756:

"Some question is raised regarding our jurisdiction on the ground that respondents are subject to the act only in so far as they are engaged in the "transmis-

sion of messages” and that in rendering the private-wire service they merely lease facilities, the messages being transmitted by the lessees. With this refinement, we cannot agree. It is true that by providing his own operators the private-wire lessee receives a service that differs in some respect from that rendered to the general public. The fallacy of the argument is, however, clearly shown when it is remembered that the service rendered to the private wire lessee corresponds very closely with that furnished by telephone companies to their subscribers.”

It is not entirely clear upon what theory the District Court predicated its conclusion that Appellant was not entitled to maintain this action. Apparently it was the view of the Court that resort should have been had to the Federal Communications Commission. Such a theory seems entirely inconsistent with the language of Sec. 406 of the Communications Act, which specifically provides a remedy by way of mandamus in the District Courts. If such a conclusion is correct, it is difficult to comprehend for what purpose Sec. 406 was passed by Congress and what was intended by its language. It is also significant that the last proviso of Sec. 406 states that the remedy given by writ of mandamus “shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this chapter.”

There can be no doubt that Appellant’s communications were wholly interstate in nature and subject to the exclusive control of the Federal Government by virtue of Congressional action; yet the District Court concluded that Appellant had no remedy in the District Court, and by so doing stripped Sec. 406 of any meaning for practical purposes.

The more reasonable interpretation of Sec. 406 would afford one prevented from receiving service in interstate communications, such as in the instant case, a speedy and appropriate remedy while the contrary interpretation denies that right and affords only the slow and costly resort to the Federal Communications Commission in Washington, D. C. On the one hand, the relief before the Federal Communications Commission can be obtained only after a considerable period of time whereas by way of mandamus the remedy is speedy and effective if the right is clear. Certainly it must have been that Congress contemplated giving one deprived of interstate-communication service an effective and immediate remedy, such as was provided for under Sec. 406.

The decision of the District Court made no differentiation between the two separate causes of action set forth in the complaint—one purporting to allege grounds for injunctive relief and the other purporting to allege grounds for relief under Sec. 406. If Sec. 406 afforded no relief, it would seem that the record clearly indicates a case in which the District Court had both the jurisdiction and all of the substantive elements required for the exercise of equitable relief by way of injunction. There appears to be no question that the Court did have jurisdiction, and that if Sec. 406 afforded no relief, then Appellant was without adequate remedy at law and entitled to equitable relief through the medium of an injunction restraining Appellee from discontinuing an interstate-communication service to which Appellant was rightfully entitled.

SPECIFICATION OF ERROR II.

The District Court Erred in Its Sixth Conclusion of Law Requiring Appellant to Resort to Either the Federal Communications Commission or the California Public Utilities Commission for Any Action or Relief.

- A. It Was Error for the District Court to Require Appellant to Seek Relief from the Federal Communications Commission Since the Issue Is Not the Reasonableness of Tariff Regulation No. 219 But Whether Appellant Can Compel Restoration of Service Improperly Denied Him.

The District Court apparently concluded that Appellant is required to apply to either the Federal Communications Commission or to the California Public Utilities Commission for any action or relief by either of said commissions against Appellee for or on account of any of the matters alleged in the complaint [R. 96].

First, with reference to the Federal Communications Commission, it is the contention of Appellant that Section 406 of the Communications Act discussed in Specification of Error I provides him with an adequate remedy for relief from Appellee's refusal to provide Appellant with interstate Morse wire service between Appellant and its customer, the Consolidated Publishing Company of Los Angeles, California.

Tariff F. F. C. No. 219 reads in part:

“(8) The service: * * *

“Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company

reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law;”

The regulation merely requires that the facilities furnished by Western Union shall not be used for any purpose or in any manner directly or indirectly in violation of any Federal law or the laws of any of the states. The issue presented by the pleadings is simply whether or not Appellant is entitled to the private wire facilities of Western Union which he has heretofore had in use. It is submitted that under Tariff Regulation No. 219, Appellant has a concomitant right to compel restoration of service unless Appellant is actually engaged in an illegal business. The question of whether or not notice from a Federal or state law enforcement agency is a legal ground for termination of the facilities is of no moment since that act has already transpired and its legal effect would be relevant only in a proceeding relating to the efficacy of such a provision as contained in Tariff Regulation No. 219.

As a matter of fact, Appellee has at no time contended that Appellant or its customer, Consolidated, is or was engaged in any illegal activity, but has predicated its case solely upon notice from the Attorney General and the Public Utilities Commission of California. It is not believed that Appellee will challenge Appellant's contention that the facts set forth in his complaint and supporting affidavits establish beyond any reasonable doubt that Appellant's business of disseminating sporting news, including racing news, over the interstate private wire facilities of Western Union to its customers throughout the United States, including its customer the Consolidated

Publishing Company of Los Angeles, California, is a legitimately recognized business. The affidavit filed by Appellee in opposition to the Order to Show Cause Why a Preliminary Injunction or a Mandatory Order Should Not Issue, does not set forth any facts to show that Appellant or his customer, Consolidated Publishing Company, was or is engaged in an illegal business, or was or is directly or indirectly violating any Federal or state law [R. 23-34]. On the contrary, the pleadings and affidavits of both parties establish without question that Appellant was supplying racing news to the Consolidated Publishing Company of Los Angeles over an interstate Morse wire and that such activity was in no way illegal.

Appellant insists that §406 of Title 47, U. S. C. A., provides him with a specific remedy to compel Western Union to restore the discontinued interstate Morse wire service and that the District Court has jurisdiction and power to order the service restored.

Again referring to the legislative history of the Communications Act of 1934, as amended, Appellant directs attention to the report of the Committee on Interstate Commerce reported in the Senate by Mr. Dill on April 17, 1934 (Senate Report No. 781, 73d Congress, 2d Session, Calendar No. 830):

“Section 406 makes Section 23 of the Interstate Commerce Act relating to the furnishing of facilities applicable to communications. This remedy is limited to the performance of duties which are so plain and so independent of administrative action by the Commission as not to require a finding by that body (*Baltimore & Ohio R. R. v. U. S.*, 215 U. S. 481). The Commission alone has jurisdiction to determine whether an existing regulation affecting rates, or any

other practice is unreasonable, or unjustly discriminatory, and the courts cannot by mandamus control its exercise of these administrative functions. (*Morrisdale Coal Co. v. Penn. R. Co.*, 183 Fed. 929.)”

A review of the pertinent decisions relating to remedy in the District Court as against pursuing an administrative remedy before the Federal Communications Commission or its predecessor, the Interstate Commerce Commission, shows without doubt that Appellant has pursued the appropriate remedy by resorting to the District Court for relief and that the District Court erred in concluding that it was without jurisdiction to hear the controversy. There is no tariff question involved in this suit. Rather, the controversy between the parties concerns a matter the answer to which does not turn on any administrative question or questions of fact peculiarly within the scope and authority of the Federal Communications Commission. It concerns a question of general law to be adjudicated by the Court, and one which the Commission, as a purely administrative body, is not uniquely qualified to entertain.

Louisville & Nashville R. R. Co. v. F. W. Cook Brewing Company, 223 U. S. 70, 56 L. Ed. 355;

Penn. R. R. Co. v. Puritan Coal Mining Co., 237 U. S. 121, 59 L. Ed. 867;

Macon, D. & S. R. Co. v. General Reduction Co., (5th Cir.), 44 F. (2d) 499, cert. den. 283 U. S. 821, 75 L. Ed. 1436.

In *Louisville & Nashville Railroad Company v. F. W. Cook Brewing Company*, 223 U. S. 70, 56 L. Ed. 355, an Indiana corporation brought suit in a Federal Circuit Court to enjoin an interstate common carrier from refusing to accept interstate shipments of intoxicating liquors

consigned to local-option points in Kentucky. There was in force at the time a Kentucky statute which forbade any transportation of intoxicating liquor into Kentucky. In compliance with that law, the defendant carrier filed with the Interstate Commerce Commission a printed circular letter which set out the full text of the Act. Concerning itself with the objection raised by defendant that plaintiff could not invoke the jurisdiction of the courts without first applying to the Interstate Commerce Commission, since the circular notice of the company had been filed with said Commission, the Court said, at page 359:

“Why should the brewing company have made complaint to the Commission? What relief could it afford? There was no tariff question. There was no discrimination against shipments tendered by complainant and like shipments tendered by other brewers to the same points. * * * To say that there was a discrimination between shipments of intoxicants and other commodities does not make a case of discrimination or preference where the denial of such shipments is based, as is the case here, wholly and solely upon an illegal restraint upon that kind of interstate commerce, is to reason in a circle, for *the question comes back at last to the validity of the law forbidding such shipments.* There was no discrimination if the law was valid, and the result must turn not upon any administrative question or questions of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. *That is a question of general law, for a judicial tribunal, and one not competent for the Commission as a purely administrative body.*” (Emphasis supplied.)

Pennsylvania Railroad Co. v. Puritan Coal Mining Co.,
237 U. S. 121, 59 L. Ed. 867, at pages 131-132:

“In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. * * *

“But if the carrier’s rule, fair on its face, has been unequally applied, * * * there is no administrative question involved, the courts being called on to decide a mere *question of fact as to whether the carrier has violated the rule to plaintiff’s damage*. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts.”
(Emphasis supplied.)

In the *Macon D. & S. R. Co.* case, *supra*, the Court distinguishes between an attack on a regulation of I. C. C. on the ground of unreasonableness and an attack directed against the carrier itself under the court’s mandamus jurisdiction in Section 23 on the specific question of whether plaintiff’s rights under the Act had been invaded by the action of the carrier. Plaintiff shipper claimed that the material was Fuller’s earth, a product which carried a higher established rate under the tariff regulation of the company. In upholding plaintiff’s right to mandamus proceedings, the Court ruled that where the unfair application of the rule or regulation to plaintiff’s damage is in issue, no question of an administrative nature is presented. Said the Court at page 501:

“The sole question is whether the material tendered is Fuller’s earth, a question on which the commission has no superior knowledge. It is also a question

whose answer has no general importance, for it may arise as to each car tendered anywhere, and will depend on an examination of each shipment for itself. *A shipper is not to be required to undertake an expensive litigation before the commission in each disputed shipment in order to secure its acceptance at the proper published rate.* He may pay the demanded rate and sue in court for the overcharge, or in case of discrimination, as here, the statute permits enforcement of the rate by mandamus." (Emphasis supplied.)

In the light of the foregoing authorities, it becomes clear that the issue of whether or not Appellant conducts a legal business is not a matter for decision by the Federal Communications Commission, but is one which Congress, under the terms of Section 406 of the Communications Act, has properly directed to the District Court.

B. The District Court Erred in Requiring Appellant to Resort to the California Public Utilities Commission for Any Action or Relief, Since That Commission Has No Jurisdiction Over Interstate Commerce.

Appellant believes that there can be little doubt that the District Court erred in requiring Appellant to seek relief from the California Public Utilities Commission. Appellant is engaged in interstate commerce and is convinced that the instant controversy is one arising under the Federal Communications Act. If so, no reasonable purpose can be served by subjecting Appellant to the regulation of any state regulatory commission. Appellant is not unmindful of the provisions in the Communications Act wherein Congress expressly permits the state to exercise jurisdiction over common carriers subject to the Act as to

their purely intrastate communication service. 47 U. S. C. A., §152(b). Appellant reiterates that the wire service provided by Western Union between Appellant and the Consolidated Publishing Company is entirely interstate and, therefore, completely outside the jurisdiction of the California Public Utilities Commission. This conclusion is supported by all of the authorities, including: *Gibbons v. Ogden, supra*; *Western Union Tel. Co. v. Foster, supra*.

As the record discloses, at page 86, the District Court found the exclusively interstate character of Appellant's business with the Consolidated Publishing Company:

“(e) Each of said drops was so maintained and operated as that any message initiated thereat could be and was immediately transmitted to all other drops connected with said leased line in the various states traversed by said line, including all of said drops connected with said leased line in California;”

A parallel case, *Western Union Tel. Co. v. Foster, supra*, is particularly significant. The facts in that case are as follows:

The New York Stock Exchange entered into contracts with Western Union whereby the Exchange agreed to furnish to Western Union and its subsidiary companies in the different states simultaneously, full and continuous quotations of prices made in transactions upon the exchange. Western Union, in turn, would furnish these quotations to its subscribers. The information would be sent over the Morse wires of the Western Union Company to the office of its subsidiary and, thence, would be transmitted by an operator to the tickers in the offices of the brokers who had subscribed for the service. Under its contract with the New York Stock Exchange, Western Union could give

such service only to those subscribers who had been approved by the Exchange. A stock broker in Boston who had not been approved for such service brought a petition before the Public Service Commission of Massachusetts, requesting that said Commission order Western Union to furnish him ticker service which was being furnished by the telegraph company from New York to its subsidiary in Boston and from that subsidiary to various subscribers in the city of Boston.

The Massachusetts Public Service Commission ordered Western Union to furnish such service, declaring the refusal an unlawful discrimination. The order of the Public Service Commission was affirmed by the Supreme Court of the state. An appeal was taken to the United States Supreme Court on the ground that the order of the Commission was a violation of the interstate commerce clause and that there was no authority on the part of the Public Service Commission to make such an order. Speaking for the Court, Justices Holmes declared, at page 112:

“It is enough that, in our opinion, the transmission of the quotations did not lose its character of interstate commerce until it was completed in the brokers’ offices, *and that the interference with it was of a kind not permitted to the states.*” (Emphasis supplied.)

and, at page 114:

“If the transmission of the quotations is interstate commerce, the order in question cannot be sustained. It is not like the requirement of some incidental convenience that can be afforded without seriously impeding the interstate work. It is an attempt to affect in its very vitals the character of a business generically withdrawn from state control,—to change the criteria by which customers are to be determined, and so to change the business. * * *

The regulation in question is quite as great an interference as a tax of the kind that repeated decisions have held void. It cannot be justified 'under that somewhat ambiguous term of "police powers".'" (Emphasis supplied.)

The highest Court in California in the past has also prevented unauthorized assumption of jurisdiction by the Public Utilities Commission of that State over carriers doing business in interstate commerce.

See:

Meyers v. R. R. Commission, 218 Cal. 316, 23 P. (2d) 26;

People v. Yahne, 195 Cal. 683, 235 Pac. 50.

In view of the foregoing authorities, one cannot refrain from speculating as to what prompted the Public Utilities Commission of California to inject itself into the interstate communications of Appellant. The Commission has obviously encroached upon a field which has been restricted to the national government. Furthermore, the Commission was not set up as an agency to enforce the criminal laws of the State of California. If there be violations by Appellant or anyone else, the Attorney General or the appropriate District Attorneys have full authority to proceed through the Courts. It certainly is an unusual situation when an interstate user of communication facilities must forever be denied service upon a simple letter in the nature of a fiat from a law enforcement officer and upon the purported findings and order of a Commission which has injected itself into a field over which it has absolutely no authority. The least Appellant should expect under the American system would be that Appellee establish by competent proof any illegal acts which might justify refusal to restore such service.

SPECIFICATION OF ERROR III.

The District Court Erred in Its Tenth Conclusion of Law That Appellant Is Not Entitled to Any Order Compelling Restoration of His Service.

A. Distribution of Racing News Does Not Directly or Indirectly Violate Any Federal or State Law and Is Recognized in California as a Legitimate Business.

Appellant has shown elsewhere in this brief that it is the positive duty of a public utility subject to the terms and provisions of the Federal Communications Act to make available leased wire facilities to all who may subscribe for them, providing that such facilities shall not be used for any purpose or in any manner directly or indirectly in violation of any Federal law or the laws of any of the states. Distribution of racing news does not directly or indirectly violate any Federal or State law, and is recognized in California as a legitimate business. The District Court of Appeal of California, in *The People v. Brophy*, 49 Cal. App. (2d) 15, has pronounced that the furnishing or receiving of racing news does not violate any law. Many other decisions uphold the legality of racing news, including the following:

In re Capital Broadcasting Co., Report of F. C. C., Jan. 30, 1948;

Hagerty v. Coleman, 133 Fla. 363, 182 So. 776;

Commonwealth v. Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59;

Penn. Publications, Inc. v. Penn. Public Utility Com., 349 Pa. 184, 36 A. (2d) 777;

Armstrong Racing Publications v. Moss, 43 N. Y. S. (2d) 171.

Capital Broadcasting Co., supra, concerned an application to the Commission for renewal of a radio station license and for a declaratory rule as to whether dissemination of racing news is contrary to public policy. The petitioner radio station gave race results and pari-mutuel prices paid at race tracks throughout the country ten minutes after the race had been run. This information was disseminated by the radio station continuously throughout the day. *The Federal Communications Commission held that it was not against the public policy of the commission to permit facilities under its jurisdiction to be used to disseminate racing news.*

The People v. Brophy, 49 Cal. App. (2d) 15, at page 33:

“Public utilities and common carriers are not the censors of public or private morals, nor are they authorized or required to investigate or regulate the public or private conduct of those who seek service at their hands. Simply because persons who received information transmitted over the telephone facilities were enabled as a result of such information, if they were so inclined, to commit unlawful acts, does not make the telephone company a violator of the criminal laws. If such were the case, the telephone company would likewise be guilty in permitting its facilities to be used in transmitting information to the newspapers of the country as to prospective horse races or prize fights, because the information thus transmitted and published induced or enabled persons to engage unlawfully in betting on the results of such contests. The telephone company has no more right to refuse its facilities to persons because of a belief that such persons will use such service to transmit information that may enable recipients thereof to violate the law than a railroad company would have

to refuse to carry persons on its trains because those in charge of the train believed that the purpose of the persons so transported in going to a certain point was to commit an offense, or because the officers of such company were aware of the fact that the passengers were intent upon visiting a bookmaking establishment upon arrival at their destination, which establishment was maintained for the purpose of unlawfully receiving bets on horse races. *Furthermore, the furnishing or receiving of racing or sporting information is not gambling and is not a crime.* (*In re Teletype Machine No. 33335*, 126 Pa. Super. 533 [191 Atl. 210, 213]. For well considered and ably reasoned cases supporting the foregoing views, see *Commonwealth v. Western Union Tel. Co.*, 112 Ky. 335 [67 S. W. 59, 99 Am. St. Rep. 299, 57 L. R. A. 614], and *State v. Shaw*, 39 Minn. 153 [39 N. W. 305].)” (Emphasis supplied.)

In *Penn. Publications, Inc. v. Penn. Public Utility Commission*, *supra*, the telephone company cut off service of plaintiff who published certain scratch sheets and gave free telephone service as to race results. All scratch sheets were sold on newsstands, and not to the subscriber. Plaintiff claimed that it was doing a legal business. The Commission ruled against plaintiff and dismissed the complaint filed against the telephone company for discontinuing racing news service to the plaintiff. Its decision was affirmed by the Pennsylvania Court of Common Pleas. The highest Court in Pennsylvania, however, reversed the lower Court's decision, holding that publishing a scratch sheet and furnishing telephone service of race results is not an illegal business and that, consequently, the tele-

phone company had the positive duty to restore plaintiff's service. Said the Court, at page 779:

"In the instant case, the appellant is engaged in a legal business. The publication of a newspaper featuring horse racing is not illegal. Horse racing is not prohibited by law in Pennsylvania, and there is nothing in our legislative history to indicate that it is contrary to public policy. Furthermore, there is nothing inherently wrongful in horse racing, and it is no more objectionable than baseball, football, and other sports. Betting is not a necessary concomitant of horse racing. It is a well known fact that many lovers of horses never place a bet on the result of a race, that while opposed to gambling they have a deep interest in developing and racing horses. Thousands upon thousands of people attend race meetings regularly for the enjoyment they get from the contests but have no interest in betting." (Emphasis supplied.)

Commenting on the failure of the telephone company to produce any evidence which could meet the burden placed upon it to justify its depriving the Appellant of telephone service, the Pennsylvania Court continues, at page 780:

"Here there is absolutely no evidence to indicate that appellant was engaged in an unlawful enterprise. All that was here shown was that some recipients of the news distributed by appellant used or may have used it for an unlawful purpose. It would be just as absurd to contend that manufacturers of playing cards and dice were aiding and abetting gambling and should be denied telephone service because policemen found such objects when raids were made, as it is to argue that the appellant in the instant con-

troversy should be refused service because 'in the past several years practically every one of the numerous raids conducted by the Philadelphia vice squad on bookmakers and bookmaking establishments have revealed the use of complainant's publication.' "

In *Armstrong Racing Publications v. Moss, supra*, the Commissioner of Licenses of the City of New York made an order prohibiting sale of publications on newsstands on grounds they contained "racing tips" to bookmakers. The Court held that the Commissioner had no legal power to ban such publications from the newsstands. Said the Court, at page 174:

"The court is not unmindful of the testimony of the police that invariably when arrests for 'book-making' * * * were made, a copy of one, several or all of the publications of these plaintiffs were found in the possession of the one arrested. * * * In the light of the custom, usage, ethics and psychology of our community, it seems fairer to measure these publications in the same way as similar information in the general newspapers of the community is concerned."

B. Under the Rules of Decision Act and *Erie v. Tompkins* Doctrine, the District Court Was Bound to Follow the Decision of the State Court in the Brophy Case Which Upheld the Legality of Disseminating Racing News.

The rules of Decision Act (28 U. S. C. A. §725) provides:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United

States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”

In the celebrated case of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, Justice Brandeis declared that there is no Federal general common law and that except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state as interpreted by its legislature or its highest court. By a subsequent decision of the United States Supreme Court, the Erie doctrine was extended to include decisions of an intermediate state court where the highest court of the state had not spoken. In *Fidelity Union Trust Co. v. Field*, 311 U. S. 169, 85 L. Ed. 109, the Court states:

“We think that this ruling was erroneous. The highest state court is the final authority on state law (*Beals v. Hale*, 4 How. (U. S.) 37, 54, 11 L. ed. 865, 872; *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78, 82 L. ed. 1188, 1194, 58 S. Ct. 817, 114 A. L. R. 1487), but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State. See *Ruhlin v. New York L. Ins. Co.*, 304 U. S. 202, 209, 82 L. ed. 1290, 1294, 58 L. ed. 860. *An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.*” (Emphasis supplied.)

The principles enunciated by the *Erie* case have been affirmed in later decisions of the United States Supreme Court. See, for example:

Six Companies of California v. Joint Highway District No. 13 of the State of California, 311 U. S. 180, 85 L. Ed. 114;

Mason v. United States, 260 U. S. 545, 67 L. Ed. 396;

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290;

Cyc. Fed. Proc., Vol. 5, Sec. 589, *et seq.*

The California court in the *Brophy* case, *supra*, has declared that the business of disseminating racing news does not violate the law. This decision enunciates the present law in California on this subject, and, it is respectfully submitted, should be controlling in the instant controversy.

C. Where a Utility Company Is Asked to Restore Service It Must Exercise Independent Judgment as to Whether Customer Is Violating the Law and May Not Rely on Unsubstantiated Statements of Law Enforcement Officers.

Appellant's contention throughout this brief has been that he conducts a business which does not violate any Federal law or the laws of any state. Under the provisions of the Federal Communications Act, he has a positive right to the private wire facilities which he has heretofore had in use. The issue raised by the pleadings in this case is simply whether or not Appellant is entitled

to said facilities; and Appellant does not believe that Appellee can justify its refusal to restore the withheld service by invoking the convenient apologetics of Tariff Regulation No. 219 or by relying on unsubstantiated statements of local law enforcement officers. The following cases support Appellant's contention:

Giordullo v. Cincinnati & Suburban Bell Tel. Co. (Ct. of C. Pleas, Ohio, 1946), 71 N. E. (2d) 858, at page 859:

"If that is true it seems to the court that the defendant had the right to withdraw plaintiff's telephone service. When it comes to the trial of this case the Telephone Company will be required to prove that defense by preponderance of the evidence and the letter of the Chief of Police requesting defendant to withdraw plaintiff's telephone service will not even be proper evidence in the case."

Shillitani v. Valentine, et al., 296 N. Y. 161, 71 N. E. (2d) 450. This case concerned a proceeding in mandamus under the New York statute to compel the restoration of telephone service which had been discontinued by defendant company on advice from the Police Commissioner that petitioner was engaged in conduct contrary to the Penal Law. Although the New York Court of Appeals held that, under the circumstances of the case, there was no warrant for compelling the telephone company to reinstate its service for petitioner, it ruled, with respect to petitioner's rights, at page 451:

"Neither the Police Commissioner nor the Police Department is given any authority by statute * * *

to require a telephone company to withhold or discontinue its service. Approval of the commissioner is not a statutory condition precedent to the granting of the relief sought by appellant, and there is no warrant or need for any direction to him in this proceeding.

“Whether or no service should be terminated or discontinued is a decision that must be made by the telephone company. That power—as well as duty—rests with the public utility, and it may not delegate the one or avoid the other. * * * whether the action is justified or warranted must be determined by the telephone company upon the facts presented.”

Salter v. New York Telephone Co. (Sup. Ct., 1946), 67 N. Y. S. (2d) 396. This was an application by petitioner for an order directing the Police Commissioner of the City of New York to approve, and the New York Telephone Company to restore, telephone service heretofore furnished to petitioner at his place of business. He had been arrested and charged with bookmaking in his business premises and at the same time his telephone was removed. The charge of bookmaking was dismissed in the Magistrate's Court, and petitioner was acquitted, but the telephone company had refused to restore service without the consent of the Police Commissioner, who declined to approve petitioner's application. The Court held that petitioner was entitled to have his telephone service restored without delay.

SPECIFICATION OF ERROR IV.

The District Court Erred in Its Seventh and Eighth Conclusions of Law Requiring (a) That the Attorney General of the United States Make Application to Said Court Alleging a Violation of the Communications Act and (b) That the Mandamus Action Be Maintained Upon the Relation of a Person Alleging a Violation of Said Act.

The District Court made the following conclusions of law [R. 96]:

“7. No application of the Attorney General of the United States, either at the request of the Federal Communications Commission or otherwise has been made herein to this court or otherwise or at all, alleging any failure of defendant to comply with any provision of Chapter 5, Title 47 of the United States Code;

“8. This action was not commenced nor is it being maintained upon the relation of any person alleging any violation by defendant of any provision of said Chapter 5, Title 47 of the United States Code which prevents any such relator from receiving defendant's service in interstate or foreign communication by wire at the same charges or upon terms and conditions as favorable as those given by defendant for like communication or transmission under similar conditions to any other person;”

Respecting the Seventh Conclusion of Law of the District Court, Appellant calls attention to the provisions of §401 (47 U. S. C. A., §401) of the Communications Act

upon which provisions rests the conclusion of the District Court. The section reads, in part, as follows:

“§401. Enforcement of chapter and orders of commission; jurisdiction.

“(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.”

It is patent that Congress, in §401(a), merely provides suitable machinery whereby the Federal Communications Commission can take the initiative in compelling enforcement of the terms of the Communications Act. Section 401(b) permits the F. C. C. to enforce in the same manner its own orders. Without §401, permitting the F. C. C. the right to have the Attorney General prosecute in its behalf, the F. C. C. would be unable to compel enforcement of its orders.

Section 406 of the Act compelling furnishing of facilities, is, as Appellant points out in Specification of Error I, a specific grant of jurisdiction by Congress to the District Courts and is entirely independent of §401(a) of that Act.

The District Court's conclusion of law No. 8 [R. 96] to the effect that this action was not commenced nor is it being maintained upon the relation of any person seems to be of no importance. However, it should be pointed out that the Federal Rules of Civil Procedure specifically abol-

ish the “writ” of mandamus and provide that the relief heretofore available by mandamus is now obtained by appropriate action or by appropriate motion under the practice prescribed by the Rules. F. R. C. P., Rule 81(b).

The note by the Advisory Committee on the effect of Rule 81(b) reads as follows:

“Note to Subdivision (b). Some statutes which will be affected by this subdivision are: * * *
U. S. C., Title 47:

§11 (Powers of Federal Communications Commission)

§401 (a) (Enforcement of Federal Communications Act and orders of Commission)

§406 (Same; compelling furnishing of facilities; mandamus)”

With respect to the requirement of Rule 81(b) of the Federal Rules of Civil Procedure that relief heretofore obtainable by mandamus may be obtained by appropriate action under the Rules, it is stated in Cyc. Fed. Proc., Vol. 13, §7066, at page 622:

“* * * the general rules contained in such Federal Rules as to pleading and complaints, as stated in a preceding chapter, are applicable. A complaint should be substituted for the petition theretofore used. *Leave to file a complaint for mandamus is unnecessary and inappropriate when mandamus is sought in a district court.*” (Emphasis supplied.)

See:

Youngblood v. U. S. (6th Cir.), 141 F. (2d) 912, 915.

SPECIFICATION OF ERROR V.

The District Court's Finding of Fact That Appellant Does Not Show Irreparable Damage Is Not Supported by the Record; And the Court Further Erred in Denying Appellant's Request for a Preliminary Injunction.

The District Court made the following finding of fact:

"It is not true that the refusal and failure of defendant to supply plaintiff with interstate Morse wire or other public utility facilities has caused or will cause plaintiff irreparable damage." [R. 92.]

The District Court also, in its 9th conclusion of law, held that Appellant was not entitled to a preliminary injunction [R. 97].

As heretofore pointed out, Appellant's complaint alleged two causes of action—the first seeking an order compelling the restoration of its leased wire service, and the second for a preliminary and permanent injunction restraining Appellee from refusing to furnish Appellant such service.

While it is recognized that, as a general principle, equitable relief will not be extended where an adequate legal remedy exists, Appellant, in keeping with the usual caution customary in the legal profession, sought relief, both legal and equitable—the legal relief sought being under Section 406 of the Communications Act and the equitable relief by way of injunction. Rule 8(e)(2), Federal Rules of Civil Procedure, provides in part:

"A party may also state as many separate claims or defenses as he has regardless of consistency and *whether based on legal or on equitable grounds, or on both.*" (Emphasis supplied.)

If, by any chance, this Court should decide that Section 406 of the Communications Act does not afford Appellant a hearing in the District Court, then it would appear that Appellant would be entitled to equitable relief. First of all the District Court did have jurisdiction in that the District Court's findings disclosed that Appellant was a citizen and resident of the State of Ohio, and that the amount in controversy exceeded \$3,000.00 exclusive of interest and costs. Since the forum of the suit is California, the District Court had jurisdiction under 28 U. S. C. A., §41(1).

The District Court having jurisdiction of the parties could afford Appellant equitable relief if the refusal and failure of Appellee to supply Appellant with the wire service was causing and did cause Appellant irreparable damage for which he had no adequate remedy at law, provided, of course, Appellant was legally entitled to the service. The District Court, however, in its findings, determined that the failure of Appellee to supply Appellant with interstate Morse wire service had not caused and was not causing Appellant irreparable damage [R. 92]. It is submitted that this finding is wholly inconsistent with the facts set forth in the pleadings and supporting affidavits, and that, on the contrary, it is clearly shown that Appellant was suffering and did continue to suffer irreparable damage.

Appellant's complaint and his supporting affidavits clearly and affirmatively show that Appellant was supplying news over the interstate Morse wire to its customer, Consolidated Publishing Company of Los Angeles, California, and was receiving pay at the rate of approximately \$500 a week for such service, and that, without such wire service, it would be unable to furnish its news to

Consolidated. Not only did Appellant suffer irreparable damage, but also its customer, Consolidated [R. 6].

With further reference to the matter of the Complaint containing both a claim for legal and equitable relief, it should be noted that it has been held that, in a proper case, an equitable suit might be brought in aid of an action for mandamus. (*City of Wheeling v. John F. Casey Co.*, (4 Cir.) 85 F. (2d) 922, 924.)

Of course, Appellant emphatically reasserts his contention which has been maintained since the inception of this suit—namely, that the District Court was authorized under Section 406 to afford the relief prayed for in the second cause of action of the Complaint.

Conclusion.

Appellant again emphasizes the fact that this case presents a simple question of whether or not Appellant is entitled to have his interstate Morse wire connection with Consolidated restored by Appellee. Appellant contends that his company is carrying on a business which has been declared legal by the Courts of the State of California, and that no showing has been made in this case of any illegal activity on its part. On the other hand, Appellee has not asserted that Appellant is engaged in any illegal activity but has predicated its Answer upon the order of the Public Utilities Commission of California and the letter of the Attorney General of that State. Neither of these documents has any probative quality in this litigation, and, in fact, would be wholly irrelevant and immaterial in determining whether or not Appellant was or was not actually engaged in an illegal business if it were open to question.

Whether or not Appellee had a right to rely upon Tariff Regulation No. 219 or whether such Tariff is reasonable is not an issue in the case, for the act of terminating the service has long since passed, and Appellant now faces Appellee with the assertion of his right to the Morse wire facility in question. Appellee is either justified or not in refusing to furnish such service to Appellant, and that must be determined upon the actual facts and not upon gratuitous statements of any State law-enforcement officer or extra-legal opinions of any State Commission.

If Appellant is violating the law and is not entitled to the leased wire service, then Appellee's Answer should set forth the facts and apprise Appellant and the Court wherein the justification lies for Appellee's refusal.

It is respectfully submitted that the order and judgment of the District Court be reversed and that an order be entered compelling Appellee, the Western Union Telegraph Company, to furnish Appellant with the interstate Morse wire facilities heretofore existing between Appellant and its customer, Consolidated Publishing Company of Los Angeles, California.

Respectfully submitted,

CHARLES H. CARR,

Attorney for Appellant.

No. 11969

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD J. McBRIDE, doing business as Continental Press
Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corpora-
tion,

Appellee.

APPELLEE'S BRIEF.

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No. 11969

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD J. McBRIDE, doing business as Continental Press
Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corpora-
tion,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

This appeal is from an order [R. 97], made after answer and hearing on order to show cause, and upon findings [R. 78-97], vacating *ex parte* temporary orders restraining refusal to render, and directing restoration of, common carrier private line telegraph service which had been discontinued after notice by state law enforcing agencies to appellee that the service was being used to violate state laws [R. 20-22].

Summary of the Facts.

Appellant's summary is deficient in essential particulars. Statement showing the pertinent provisions of appellee's Tariffs filed with the Federal Communications Commission, appellant's contract for the service in question, and the facts as found by the District Court, is, therefore, necessary:

May 19, 1945, appellant, doing business as Continental Press Service, applied for lease of and was furnished appellee's common carrier private line telegraph facilities and service from Chicago, Illinois, to Seattle, Washington, via Los Angeles and San Francisco, California, and installed and thenceforward furnished such facilities and service [R. 83].

The regulations in appellee's Tariff No. 219 filed with the Federal Communications Commission required, and still require, that leased facilities may be employed only for the private use of "companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives" [R. 82], and that they "shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law" [R. 82].

Appellant's application for the leased facilities and service, which was accepted by appellee May 19, 1945, contained the following stipulation:

"The undersigned requests The Western Union Telegraph Company to furnish, subject to and in

accordance with its lawful rates and regulations, the service described (including such modifications therein as may be ordered from time to time) * * *

“The undersigned agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law” [R. 84].

The court found that appellant had exclusive control over the leased facilities [R. 86]; that appellee’s only connection therewith was to keep them in operating order, and that appellee was not informed of the contents of any communication over or other use made of the leased facilities until it received the notices from California law enforcing agencies hereinafter mentioned [R. 87].

Long prior to, on, and after, March 4, 1948, and until the discontinuance complained of, the leased facilities included a “drop” with a Morse telegraph instrument at each of the following eight locations in California [R. 86]:

333 Montgomery Street, San Francisco;
1911 Edison Highway, Bakersfield;
181 Andreas Road, Palm Springs;
Room 211, Platt Building, San Bernardino;
362 D Street, San Bernardino;
208 West Eighth Street, Los Angeles;
615 North La Brea, Los Angeles;
919 Fourth Avenue, San Diego.

Each “drop” was so operated that any message initiated thereat could be and was immediately transmitted to all other drops on the leased line [R. 86].

March 4, 1948, the District Attorney and Sheriff of Kern County, California, and the Chief of Police of the City of Bakersfield, joined in written notice to appellee that the telegraph instrument and wire at the “drop” at 1911 Edison Highway, Bakersfield, California (being one of the drops in the leased facilities), were being used to “aid, assist, and carry on the business of illegal book-making” and to violate sections 182 and 337a¹ of the California Penal Code, and demanded that the “drop” be discontinued [R. 72-73, 89].

March 31, 1948, appellee received written notice from the Attorney General of California that the leased facilities at each of said eight addresses in California (including “615 North La Brea, Los Angeles,” the place of business of appellant’s customer, Consolidated Publishing Company [R. 13, 15, 19]) were, as indicated by the transcript of proceedings then pending before the California Public Utilities Commission, engaged in furnishing information to bookmakers in violation of section 337a of the Penal Code of California, and demanding that the service at said places be discontinued [R. 73-75, 89-90].

Appellee immediately informed appellant that it had received the respective notices and that it intended to

¹Section 182 of the California Penal Code denounces conspiracy to commit any crime;

Section 337a of said Code provides that any person “who engages in pool-selling or book-making, with or without writing, at any time or place” is punishable by imprisonment;

Section 659 of the same code provides that every person who aids another in the commission of a misdemeanor is guilty of a criminal offense.

comply with the demands therein made [R. 90]. Appellant did not challenge the truth of the statements made in the notices.

April 2, 1948, appellee, relying upon the truth of the notices from the law enforcing agencies, and pursuant to the above quoted regulations in its F. C. C. Tariff No. 219 and the stipulation in appellant's application, discontinued the service [R. 49, 91].

April 6, 1948, the California Public Utilities Commission, following its public investigation into the use of public utility communication facilities for illegal purposes referred to in the Attorney General's notice, announced its decision,² finding, among other things, that appellee's facilities leased to appellant, including "drops" at each of the eight addresses above specified [R. 59-60], were being used by appellant's customer, Consolidated Publishing Company, and other persons, for illegal purposes [R. 65, 91].

April 22, 1948, this action was commenced and the District Court made the *ex parte* orders which were later vacated [R. 20-22].

The complaint alleges, in effect, that the leased facilities and service had been discontinued "wrongfully and without just cause" [R. 9]. No mention is made in the complaint or in the supporting affidavits of the above quoted regulations in appellant's Tariffs filed with the Federal Communications Commission, or of the stipulation in appellant's application, or of the notices from the law enforcing agencies.

²The decision appears at pages 56-71 of the record, and is referred to in the findings of the District Court for further particulars [R. 91].

No facts are stated showing any violation of Chapter 5, Title 47, of the United States Code (Federal Communications Act) which prevents appellant from receiving appellee's service by wire at the same charges or upon terms and conditions as favorable as those given by appellee for like service under similar conditions to any other person [R. 8-9, 96-97]. The court found that there were no such facts and that appellee has been at all times ready and willing to provide appellant with its leased telegraph facilities and service without discrimination [R. 92].

The court also found that no application has been made to the Federal Communications Commission to modify the regulations in said Tariff No. 219, revised page 8, or to the California Public Utilities Commission to modify its decision of April 6, 1948 [R. 92-93]; that there has been no application by the Attorney General of the United States or request by the Federal Communications Commission that this action be filed, and there is no allegation of failure by appellee to comply with, or that appellee has violated, any provision of the Federal Communications Act [R. 94]; that discontinuance of facilities and service leased to appellant was not arbitrary or without just cause, but was pursuant to and in reliance upon appellant's contract, the Tariff regulations and the notices from law enforcing agencies [R. 96]; that appellant is not entitled to the relief prayed for or to have the *ex parte* temporary orders continued in force, and that it is not entitled to maintain the action [R. 97].

May 5, 1948, the *ex parte* temporary restoration and restraining orders were vacated, and the request for preliminary injunction and order directing restoration of service was denied [R. 77-78, 97-98].

Appellee's Contentions.

I. Appellant expressly agreed that appellee could discontinue the leased wire telegraph service on receipt of notice from state law enforcing agencies that it was being used to violate the law.

II. Discontinuance of the leased telegraph service was expressly authorized by the regulations in appellee's Tariff No. 219, revised page 8, filed with the Federal Communications Commission.

III. Appellant's recourse is to the Federal Communications Commission, and not to the courts.

IV. Neither section 401 nor section 406 of the Federal Communications Act is applicable to this case.

V. The orders appealed from should be affirmed.

ARGUMENT.

I.

Appellant Expressly Agreed That Appellee Could Discontinue the Leased Wire Telegraph Service on Receipt of Notice From State Law Enforcing Agencies That It Was Being Used to Violate the Law.

Appellant's application for service was accepted by appellee on May 19, 1945, and the leased facilities were furnished accordingly. Among other things, the application provides:

"The undersigned agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law" [R. 84].

On March 4 and March 31, 1948, respectively, the state law enforcing agencies notified appellee that its leased facilities at the respective locations described in the notices were being used to aid bookmaking and to furnish information to bookmakers in violation of section 337a of the California Penal Code [R. 72-73, 73-75, 89-90].

It is, of course, elementary that one who has by contract or otherwise expressly authorized an act or course of

conduct, may not invoke equitable relief against the normal consequences thereof.³

It is also an undoubted principle that courts will not lend their aid to the doing of anything which is illegal or inconsistent with sound morals or public policy.⁴

The regulations in Tariff No. 219 provide that leased facilities "may be employed only for the *private* use of those companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives, and each such office shall transmit and receive its particular communications over the equipment installed therein" [R. 81-82]. The regulations thus contemplate complete control by the lessee of leased facilities and of all communications over them. The court found that appellant had such control [R. 86-87].

In accordance with the Tariff regulation positively forbidding use of the facilities "for any purpose or in any manner directly or indirectly in violation of any * * * law," and authorizing discontinuance thereof on notice from law enforcing agencies that they are "being supplied contrary to law," appellant expressly agreed that appellee's facilities under his exclusive control would not be used to

³*Freeman v. Scherer* (Kan. 1916), 154 Pac. 1019; 1022;
Stewart v. Hovey (Kan. 1891), 26 Pac. 683;
Downs v. Board of Com'rs (Kan. 1892), 29 Pac. 1077;
Lester v. Sullivan (Ky. 1908), 107 S. W. 300, 301.

⁴*Marshall v. Baltimore and Ohio Railroad Company* (1853), 16 How. 314, 334;
Howard Sports Daily v. Weller (Md. 1941), 18 Atl. 2d 210, 214.

violate the law and that they could be discontinued on receipt by appellee of the prescribed notice from law enforcing agencies.

It was certainly competent for the Federal Communications Commission to forbid the use of services subject to its plenary regulation to violate the law, and to prescribe the evidence necessary to warrant their discontinuance for such illegal use. It was equally competent for the parties to agree accordingly.

Appellant's situation, when informed of the receipt by appellee of the notices, was analogous to that of one who, being informed of circumstances sufficient to put a prudent man on notice, fails to inquire—he could not, in good conscience, close his eyes to the official accusations and at the same time insist upon maintenance by appellee of the service at the risk of its being accused of violating the criminal laws of the state and the Tariff regulations.⁵

While the complaint alleges that appellant is engaged in “disseminating information of sporting events, including racing news” [R. 3], and that its customer, Consolidated Publishing Company of Los Angeles, is likewise engaged [R. 5], it does *not* allege that either appellant or its customer has been or is *exclusively* so engaged, nor does appellant, in the complaint or otherwise, challenge the truth of the statements made in the notices, or either of them.

The District Court was not, when it made the preliminary orders, informed, by anything in the record, of the Tariff regulations, or of appellant's application and contract, or of the notices from the law enforcing agencies,

⁵See California Civil Code, Section 19;
2 Pom. Eq. Jur. (5th Ed.), pages 651, 653;
Fresno Canal etc Co. v. Rowell (1889), 80 Cal. 114, 117;
Wood v. Carpenter (1879), 101 U. S. 135, 141.

or of the proceedings before, or the decision by, the California Public Utilities Commission. These facts were fully disclosed at the hearing upon the order to show cause, and the orders directing restoration of the leased service and for injunction were thereupon vacated.

Appellant complains that the Attorney General's notice does not specify in what manner the Public Utilities Commission's hearing indicated that the leased wires were being used to aid bookmakers; that it "did not supply appellee with any facts indicating that appellant or its customer, Consolidated, was violating any law" (Op. Br. p. 9); also that the affidavit filed by appellee "does not set forth any facts to show that appellant or his customer, * * * was or is engaged in an illegal business, or was or is directly or indirectly violating any Federal or state law" (*id.*, p. 25);⁶ and contends that neither the notices nor the Commission's decision have "any probative quality in this litigation" (Op. Br. p. 47); that "whether or not notice from a Federal or state law enforcement agency is a legal ground for termination of the facilities is of no moment" (*id.* p. 24); and that "there is no tariff question involved in this suit" (*id.* p. 26).

⁶The affidavit referred to, after reciting receipt of the notice of March 4, 1948, from the Kern County officials that the leased facilities in Bakersfield "were being used to violate section 337a and section 182 of the Penal Code" and of notice from the Attorney General of March 31, 1948, that the leased facilities at each of the eight addresses specified (including the address of Consolidated Publishing Company) "were being used to furnish information to bookmakers in violation of section 337a of the Penal Code" [R. 30-31], and that discontinuance of service was "pursuant to and because of" said notices, and concludes, "All of the acts and conduct of defendant referred to in the complaint and in this affidavit have been pursuant to, in reliance upon, and in conformity with the established Tariffs * * * and in reliance upon the representations and demands of State law enforcement officers as herein stated" [R. 34].

In the light of the regulations, the contract, the notices, and the decision of the Public Utilities Commission, appellant's position exhibits obvious misapprehensions. He mistakenly assumes that the notice must, in order to warrant any attention, not only contain the essentials of an indictment, but must, in itself, be competent evidence of facts sufficient to constitute violation of the law, and that accusations by sworn officers of the state and findings by the state regulatory body that specific sections of the Penal Code are being violated by means of facilities under appellant's exclusive control are not sufficient to even require inquiry or response.

It is respectfully submitted that these contentions are inconsistent with the express provisions and obvious purpose of the regulations in appellee's Tariff No. 219, revised page 8, and with the plain language of appellant's contract.

Discussion about the jurisdiction of the Federal Communications Commission and the California Public Utilities Commission over the leased wire service is beside the point. It is, of course, the function of the state to suppress crimes against its laws. To warrant any assumption of national intent to interfere with the exercise of that function, even where the operation of a Federal law is involved, clear and unequivocal language to that effect is necessary. The rule was thus declared by Mr. Chief Justice Marshall in an early case:

"To interfere with the penal laws of a State, where they are not levelled against the legitimate powers of the Union * * * is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately."⁷

⁷*Cohens v. Virginia* (1821), 6 Wheat. 264, 443.

The Federal Communications Act exhibits no such intention. The regulation in appellee's Tariff No. 219, revised page 8, filed with the Federal Communications Commission, which is reproduced in appellant's agreement, positively forbids use of leased private line telegraph facilities "for any purpose or in any manner directly or indirectly in violation of any * * * law," and authorizes discontinuance thereof on notice from law enforcing agencies that the facilities are being so used. This is tantamount to a declaration by the Federal Communications Commission that it will not "permit the declared policy of the States, * * * to be overthrown or disregarded by the agency of interstate commerce."⁸

If investigation by the Public Utilities Commission or any law enforcing agency of the state discloses violation of law, no one will contend that the discovery should be suppressed because the instrumentality involved is an interstate carrier.

Appellant's course, when informed of receipt by appellee of the respective notices and of appellee's intention to comply with the demands therein made, was clearly charted by decisions involving almost identical situations:⁹ that is, to challenge the statements in the notices, if they were untrue, and then, if necessary, seek judicial protection against any asserted invasion of his rights.

Appellee's course was equally clear: under the regulations in its F. C. C. Tariff No. 219, revised page 8, and the express terms of its contract with appellant, it had no alternative but to discontinue the service.

⁸*Lottery Case* (1903), 188 U. S. 321, 357.

⁹See *Fogarty v. Southern Bell Telephone & Telegraph Co.* (1940), 34 Fed. Supp. 251;

Hamilton v. Western Union Telegraph Co. (1940), 34 Fed. Supp. 928;

Tracy v. Southern Bell Telephone & Telegraph Co. (1940), 37 Fed. Supp. 829.

II.

Discontinuance of the Leased Telegraph Service Was Expressly Authorized by the Regulations in Appellee's Tariff No. 219, Revised Page 8, Filed With the Federal Communications Commission.

Appellee's Tariff No. 219, revised page 8, filed with the Federal Communications Commission, provides:

"Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law" [R. 25].

The regulation is clear and specific; it was repeated in appellant's application for service; both are pleaded in the answer [R. 41, 43], along with allegations that the application was accepted and the service furnished pursuant thereto and to the Tariff regulations, and was discontinued in obedience to the regulations and as authorized by the contract, after notices by law enforcing agencies that the service was being used to violate the state laws [R. 46-49, 50]. The discontinuance was not, however, until after appellant had been informed of the notices and had left unchallenged the truth of the statements made therein.

Notwithstanding these unquestioned facts, appellant says (Op. Br. p. 24) that "The issue presented by the pleadings is simply whether or not Appellant is entitled to the private wire facilities * * * which he has heretofore had

in use.” It is respectfully submitted, however, that this is not correct; that, on the contrary, the issue is: Was the discontinuance of service authorized by appellant’s contract and the regulations? It has been heretofore shown that the discontinuance was authorized by the contract. It is respectfully submitted that appellee having received the notices prescribed by the regulation, it must follow both on principle, and under the regulation, that the discontinuance was not only authorized, but required, by the regulations.

In a Maryland case, where leased wire telegraph service had been discontinued on warning from a United States Attorney that it was being used in violation of law, the telegraph company successfully relied upon the same F. C. C. Tariff 219, page 8, before its revision by addition of the clause expressly authorizing discontinuance upon receipt of the prescribed notice from law enforcing agencies. The subscriber first complained to the Maryland Public Service Commission; the complaint was dismissed. He then complained to the state court, which ordered the Commission to show cause why its action should not be vacated. After hearing, the Supreme Court of Maryland said:

“But it is well settled that a telegraph company has the right to refuse service which is connected with illegal operations. The company may refuse to render such service, not only where such action would subject it to prosecution as a participant in the illegality, but also where it would have the effect of promoting illegality, even though the company might not be liable to punishment for rendering the service. * * * Otherwise, telegraph companies would be converted into public vehicles for the consummation of all kinds of illegal designs. * * *

“* * * no court should lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy, or which tends to corrupt or contaminate by improper influences the integrity of our social or political institutions * * * The State, in the exercise of the police power and in the interest of the public welfare, has the undoubted right to regulate and limit the right of contract.”

Howard Sports Daily v. Weller (Md., 1941), 18 Atl. 2d 210, 214.

Similarly, in *Hamilton v. Western Union Telegraph Co.*, decided in 1940 (34 Fed. Supp. 928), the telegraph company justified threatened discontinuance of service under said Tariff No. 219, page 8, after warning by a United States Attorney that if the services were continued the company “would be held to account for knowingly aiding, abetting, and conspiring in the violation of state and federal laws.” The court said (p. 929):

“The tariffs published by the defendant contain a provision preventing lessees of its wires from using its service to violate, directly or indirectly, any federal or state law. Even without such provision in the tariffs, the defendant would not only be authorized, it would be obligated, to discontinue service which contributes to and facilitates the operation of a business or enterprise in violation of law. Any person or company that knowingly assists in a scheme to violate the law is subject to prosecution. A court of

equity will not restrain the discontinuance of service by a utility if the character of the use of the service is such as to justify an honest doubt as to its legality. The service which a person has the right to demand of a public utility is service lawful in character.” (Italics added.)

See, also:

Tracy v. Southern Bell Telephone & Telegraph Co. (U. S. D. C., So. Dist. of Fla., 1940), 37 Fed. Supp. 829;

Hagerty v. Southern Bell Telephone & Telegraph Co. (Fla., 1940), 199 So. 570;

People ex rel Hiegel v. New York Telephone Co. (1922), 195 N. Y. Supp. 332;

People ex rel Restmeyer v. New York Telephone Co. (1916), 159 N. Y. Supp. 369, 370;

Rulings by state regulatory bodies are to the same effect:

Partnoy v. Southwestern Bell Telephone Co. (Mo., 1947), 70 P. U. R., N. S. 134, 144-145;

Slapkowski v. New Jersey Bell Telephone Co. (N. J., 1947), 67 P. U. R., N. S. 33, 34;

Carrozza v. New England Telephone & Telegraph Co. (Mass., 1945), 61 P. U. R., N. S. 249, 250, 252-253;

Ganck v. New Jersey Bell Telephone Co. (N. J., 1944), 57 P. U. R., N. S. 146, 148-149;

Re Michigan Bell Telephone Co. (Mich., 1940), 34 P. U. R., N. S. 65.

The case of *People v. Brophy* (49 Cal. App. 2d 15), relied upon by appellant, involved no regulatory or contractual provisions such as are here presented, and has no application to this case. The court there held that an order by the Attorney General requiring discontinuance of telephone service because the subscribers were "furnishing information to bookmaking establishments throughout the State through the use of telephonic equipment furnished by your company," was unauthorized by either law or regulation, and was no defense to an action to restrain such discontinuance; that it amounted to no more than a recital of information which the telephone company had received, and its source.

Likewise, neither *Pennsylvania Publications, Inc. v. Pennsylvania Pub. U. Com'n* (Pa., 1944), 36 Atl. 2d 777; *Giordullo v. Cincinnati & Suburban Bell Telephone Co.* (Ohio, 1946), 71 N. E. 2d 858; *Shillitani v. Valentine* (N. Y., 1947), 71 N. E. 2d 450, nor *Salter v. New York Telephone Co.* (N. Y., 1946), 67 N. Y. S. 2d 396, cited by appellant, involved any public utility regulation authorizing discontinuance of service on receipt of notice from law enforcing agencies that it is being used to violate the law. They, therefore, have no application here.

In this case, the Tariff regulation, having the force and effect of law, specifically forbids use of leased wire facilities to, for any purpose or in any manner, directly or indirectly violate the law, and authorizes discontinuance of the ser-

vice on receipt of notice from law enforcing agencies that the facilities are being so used.¹⁰

Assuming, as appellant claims, that "distribution of racing news does not directly or indirectly violate any federal or state law," it is undeniable that bookmaking is condemned by section 337a of the California Penal Code and that aiding and abetting bookmaking is an offense under section 659 of the same code. The notices warned appellee that its facilities at the places specified were being "used to aid, assist and carry on the business of illegal bookmaking" in violation of section 337a of the Penal Code of California [R. 72], and "are engaged in furnishing information to bookmakers in violation of section 337a of the Penal Code" of California [R. 74]. The statements made in the notices were unchallenged.

Under the circumstances, failure by appellee to discontinue the service would have been at the risk of being charged with permitting the continued use of its facilities to aid and abet bookmaking, contrary to its Tariff regulations and in violation of state law.

¹⁰As shown by the record herein, the California Public Utilities Commission has, since the decision in the *Brophy* case, ordered that public utility service *must* be discontinued whenever the utility "has reasonable cause to believe that the use made or to be made of the service, or the furnishing of service to the premises of the applicant or subscriber, is prohibited under any law, ordinance, regulation or other legal requirement, or is being used, or is to be used, as an instrumentality directly or indirectly to violate or aid and abet the violation of the law," and that written notice from any law enforcement officer stating "that such service is being used or will be used as an instrumentality to violate, or to aid and abet the violation of, the law, is sufficient to constitute such reasonable cause." The order also requires that each contract for communication service contain the provisions of this decision [R. 70-71].

The regulations are not, as appellee assumes, "convenient apologetics" (Op. Br. p. 40), but are to enable the utility to avoid the risk of becoming involved in aiding and abetting violation of law by heeding and acting upon the warnings of sworn public officials.

Their purpose is quite analogous to that of statutes requiring termination of leases because of the use of leased premises for illegal purposes—such as dispensing liquor or prostitution. It has long been recognized that statutes of the latter sort are to enable lessors to protect themselves against prosecution for allowing unlawful activities by authorizing them to dispossess a transgressing tenant immediately upon discovery of the wrong doing.¹¹

If appellant had, responsive to warning that appellee had received the notices, challenged the truth of the statements in the notices, or, admitting the fact, had stated that the illegal activities were without his knowledge and had been stopped, a different situation might have been presented. The notices were unchallenged; obedience to the Tariff regulations was imperative.

¹¹32 Am. Jur., Sec. 864, page 731;

2 Tiffany on Landlord and Tenant, page 1754;

People ex rel. Jay v. Bennett (1878), 14 Hun, N. Y. 63;

McGarvey v. Puckett (1875), 27 Ohio St. 669;

Trask v. Wheeler (1863), 89 Mass. 109.

See, also, *Mammoth Oil Co. v. United States* (1927), 275 U. S. 13, 27.

III.

Appellant's Recourse Is to the Federal Communications Commission, and Not to the Courts.

Appellee's answer denies [R. 46] that the discontinuance of service was wrongful, arbitrary, or without just cause; the court found accordingly [R. 87, 88]. There is no claim that Tariff No. 219, revised page 8, is either unreasonable or arbitrary.

The discontinuance of service having been in strict accord with the Tariff, any claim that the discontinuance was arbitrary or unreasonable must be attributed to the regulation, not to the telegraph company. So long as the regulation stands, neither appellee nor any one else can disregard or violate it, and no court can authorize or direct its violation.

For complaint, therefore, that the regulation is arbitrary or unreasonable, the exclusive remedy is by application to the Commission to change it.

"It is urged * * * that the regulation in question is unlawful because it is unreasonable * * * But we agree with the District Court that where the claim of unlawfulness of a regulation is grounded in lack of reasonableness, the objection must be addressed to the Commission and not as an original matter brought to the court. We think that the Act confers jurisdiction upon the Commission to hear appellants' grievances against the substance of this regulation."

Ambassador, Inc. v. United States (1945), 325 U. S. 317, 324;

Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co. (1910), 215 U. S. 481, 492-4;

Ten Ten Lincoln Place v. Consolidated Edison Co. (1947), 73 N. Y. S. 2d 2, 7.

IV.

Neither Section 401 nor Section 406 of the Federal Communications Act Is Applicable to This Case.

Sections 401¹² and 406¹³ of the Federal Communications Act neither contemplate nor authorize resort to the courts to coerce or otherwise compel violation of regulations of the Federal Communications Commission.

Section 401 of the Act vests district Courts with jurisdiction *upon application of the Attorney General, at the request of the Commission*, alleging failure to comply with or the violation of any provision of the Act, to issue writ of mandamus compelling compliance.

Obviously, no such situation is here presented.

Section 406 vests such courts with jurisdiction

“upon the relation of any person alleging any violation, by a carrier subject to this chapter, or any of the provisions of this chapter which prevent the relator from receiving service * * * from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue * * * writs of mandamus.”

There is no claim or allegation, either “on relation of any person,” or otherwise, that appellant, or any one else, is being prevented “from receiving services * * * at

¹²U. S. Code, Title 47, 1948 pocket part, p. 81.

¹³*Idcm.*, p. 99.

the same charges, or upon terms * * * as favorable as those given by" appellee to any other person.

Chapter 5 declares the purpose of the Act to be the regulation of communication by wire and radio so as to make such service available on equal terms to all (section 151); it requires the furnishing of service upon request "in accordance with the orders of the Commission," authorizes the Commission to prescribe regulations, which must be reasonable (section 201), and forbids furnishing facilities otherwise than as therein specified (section 203). It also authorizes investigations by the Commission as to *whether any rate or regulation is discriminatory, unreasonable or otherwise contrary to the Act*, and to make such orders as may be appropriate with reference thereto (sections 205, 208).

F. C. C. Tariff No. 219, revised page 8, forbids any use of telegraph facilities to directly or indirectly violate or aid or abet the violation of any law, and authorizes discontinuance of service on notice from law enforcing agencies that it is being so used. The Tariff is, of course, binding upon the carrier, its customers, and the courts.

Section 406 authorizes resort to the courts only where the utility refuses or fails to perform a duty so plain as not to require action by the regulatory authority. It is practically identical with section 23 of the Interstate Commerce Act. Construing the latter section, the Supreme Court has said:

"* * * the remedy afforded by that section
* * * must be limited either to the performance

of duties which are so plain and *so independent of previous administrative action of the commission* as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the commission or enjoined by the courts.” (Italics added.)

Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.,
(1910), 215 U. S. 481, 499.

Obviously, in the face of the regulation and the conditions confronting the telegraph company on April 2, 1948, the latter's duty to continue the leased wire service was not plain and “independent of previous administrative action of the commission,” nor did such duty arise “from the obligatory force which the statute attaches to” any order of the commission—quite the contrary.

If, as appellant apparently contends, the regulation authorizing discontinuance of telegraph service on notice from state law enforcing agencies that it is being used to violate or to aid and abet in the violation of state laws is arbitrary or unreasonable, his complaint should have been to the Federal Communications Commission to change the regulation—not to the District Court to compel violation of the regulation.

V.

The Orders Appealed From Should Be Affirmed.

The discontinuance of service having been as authorized by the Tariff regulations and the contract between appellant and appellee, the orders appealed from are correct, and should be affirmed.

Respectfully submitted,

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By Oscar Lawler,

Attorneys for Appellee.

No. 11,969

IN THE

United States Court of Appeals
For the Ninth Circuit

EDWARD J. McBRIDE, doing business as
Continental Press Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COM-
PANY (a corporation),

Appellee.

AMICUS CURIAE BRIEF ON BEHALF OF
THE PEOPLE OF THE STATE OF CALIFORNIA AND THE
PUBLIC UTILITIES COMMISSION OF SAID STATE.

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PUBLIC UTILITIES COMMISSION OF SAID STATE.**

Leave of the Court having been first sought and obtained, the People of the State of California and the Public Utilities Commission of said State file this their brief as amicus curiae.

I.

PRELIMINARY STATEMENT.

We contend that the judgment of the District Court is correct and is soundly and sufficiently based upon the

tariff rule and regulation¹ filed by appellee with the Federal Communications Commission, which authorized appellee to discontinue the interstate wire service involved herein, in the circumstances shown by the record. We shall discuss this point more fully hereafter. We do not take the position that the validity of the decision of the Public Utilities Commission, concerning communications service, facilities and instrumentalities, constitutes a lawful issue in this case, for the reason that said decision comprehends only—and necessarily so—intrastate communications service. The interstate communications field has been completely occupied by the Federal government by the enactment of the Communications Act of 1934² and by thus preempting said field has swept away any State jurisdiction theretofore existing. Our position is that the validity of said decision of the Public Utilities Commission is not before this Court as a lawful issue in this case, because it could have no application to the subject matter of this action, which is concerned exclusively with interstate communications service. Said decision of said Commission shows on its face that it extends only to communications utilities operating under the jurisdiction of said Public Utilities Commission. In its interstate communications operations, appellee does not operate under the jurisdiction of said Public Utilities Commission.

¹Said tariff rule and regulation provides in part as follows:

“Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law.”

²47 U.S.C.A. 151-609.

For the foregoing reasons, it is our view that the validity of said decision of said Commission is not a lawful issue in this case.

II.

THE PUBLIC INTEREST IS VITALLY CONCERNED AND INVOLVED IN THE ISSUES OF THIS CASE.

On the issue of the public interest, we here point out that the invalidation of this tariff rule and regulation, filed by appellee with the Federal Communications Commission, would render practically impotent the several States to adequately enforce their laws denouncing "book-making" as a public offense. This result would derive from the fact that the States would then be practically defenseless against their being flooded by the racing information (the indispensable base for the very existence of successful "bookmaking") carried over the interstate telegraph wire leased by appellee to appellant. The sustaining of the validity of said tariff rule and regulation is most important to the People of the State of California.

Although the legal effect of the decision of the Public Utilities Commission, heretofore referred to under "Preliminary Statement" (p. 1, *supra*), applies only to intrastate communications, as we there pointed out, and does not constitute a lawful issue in this case, we do desire to point out that the opinion part of said decision and the findings of fact therein are very illuminating, as applied to the interstate wire service involved in this case. (Record, pp. 56 to 69.) To illustrate the methods and means employed by the appellant in furnishing this wire

service for criminal ends, we quote from the opinion of the decision of said Public Utilities Commission as follows:

“The testimony indicated that there has developed in the United States special racing news-gathering services. Among these are the Continental Press Service and the Pioneer News Service. According to the testimony, the Continental Press Service consists of a wire service which is leased from the Western Union and which has outlets at various cities throughout the United States; specifically, this press service has the following drops in California:

<u>Name of Subscriber</u>	<u>Address</u>	<u>Date Service Started</u>
Tejon News	1911 Edison Highway Bakersfield	5-12-45
Consolidated Publishing Co.	615 N. La Brea Ave., Los Angeles	5-12-45
Los Angeles Journalist	208 W. 8th St. Los Angeles	5-12-45
George Zouganiles	181 Andreas Rd. Palm Springs	9-3-46
Arrowhead News	362 D Street San Bernardino	8-12-46
Colton News	211 Platt St. San Bernardino	8-12-46
Southwest News	919 4th Avenue San Diego	11-5-45
Krelling & Cohen	333 Montgomery St. San Francisco	5-12-45

This press service is a Morse wire and the drops consist of both sending and receiving telegraph sets.

“The Pioneer News, having headquarters at 333 Montgomery Street, San Francisco, California, is a

service consisting of a wire leased from Western Union, over which is operated teleprinter or ticker sets. These teleprinters are the same instruments as are used in reporting stock-market news and are located at various drops in California; specifically, these locations are:

<u>Name</u>	<u>Address</u>	<u>Date Service Started</u>	<u>Date Temp. Discon.</u>
Roy Simon	1910 Tuolumne St. Fresno	6-22-46	2-19-48
J. Bozeman	326 Virginia St. Vallejo	5-25-46	1-29-48
W. Musso	215 Georgia St. Vallejo	5-25-46	1-29-48
J. Farrell	216 Georgia St. Vallejo	5-25-46	1-23-48
Mint Smoke Shop	237 Georgia St. Vallejo	8-14-47	1-29-48
Del Kennedy	1160 Old Country Rd., Belmont	10-8-45	2-19-48
M. Mage	1617 Old Country Rd., Belmont	7-19-47	2-19-48
C. Atkin	145 Montgomery St. San Francisco	10-8-45	2-19-48
Pioneer News	127 Montgomery St. San Francisco	1-30-46	2-19-48
F. Masonic	145 Mason St. San Francisco	3-4-46	2-19-48
101 Service Station	Bayshore Highway Bayshore	1-31-47	4-16-48
Andy's Service	2637 Bayshore Hwy. Bayshore	8-16-47	1-30-48
Geneva Club	2201 Geneva Ave. Bayshore	11-17-47	2-19-48

It will be noted from an analysis of the above table that most of the drops of the Pioneer News Service were temporarily disconnected after the commencement of these hearings on February 18, 1948.

“While the technical equipment of these two wire services, the Continental Press and the Pioneer News, are different in that one uses telegraph keys and the other uses teleprinters, still, in other respects, the basic method of operation is similar. Information as to this method of operation was produced at the hearing. Since the Continental Press and the Pioneer News are among those services which are barred from the race tracks, they use various unorthodox methods to obtain information. The most common of these methods, according to the testimony, is to use ‘signalers’ or ‘wigwaggers’, individuals who attend the races at the track and, by a system of signals, relay information to confederates outside who, in turn, send the information to the wire services.

“Exhibits Nos. 33 to 37, introduced in evidence, consist of photographs showing a phone installation and a telescope in a house within view of the Santa Anita Race Track. The equipment shown in the photographs was used by one Ed Coplansky who, apparently, employed a telescope to observe signals from wigwaggers within the track. The information so obtained was telephoned to a drop of one of the wire services. The phone used by Coplansky was one which illegally had been tapped into the phone line of the owner of a nearby house.

“The apparent reason these specialized wire services go to such extremes to obtain information is that special information is needed by their clients in order to conduct successful bookmaking activities. According to the testimony the information sent out over the regular news services and published in the regu-

lar newspapers, and even the detailed description of the running of races given over the radio, do not supply sufficient details to permit successful book-making. A bookmaker needs the following information: (1) direct race odds and fluctuations in these odds; (2) the post time; (3) the exact off time within a matter of seconds; (4) a brief description of the race; (5) results of the race; (6) prices paid. In addition, a bookmaker needs information as to last-minute jockey changes and track conditions. These details are only furnished by the special racing wire service agencies.

“As previously indicated, this detailed information is obtained at the race track by one device or another, then it is phoned to one of the offices of the wire service. At this office the information is placed on the wire and is immediately relayed to all of the drops of that particular wire service. Testimony was presented showing the operation of these drops. As soon as racing information is received it is called over a loud-speaker system. In front of the loud speaker are various phones, with the receivers off the hook, and, apparently, at the other end of these phones, bookmakers are listening for the information. Thus, in a matter of seconds, it is possible to get the information from the track to the bookmakers.

“Testimony was presented by various police officers and sheriff’s office employees as to visits they had made to these various wire service drops. In each of these places, according to the testimony, there are multiple phone installations. Instances were reported of as many as 26 phones in one room and other testimony presented by the telephone company showed the subscribers to these various phones. Photostatic copies of the telephone cards listing the names of these subscribers were received in evidence

as Exhibits Nos. 38 to 79, inclusive, and 80 to 92, inclusive. A general examination of these cards discloses that, while there were several phones in one place, most of them were listed under various fictitious names, including such terms as secretarial services, process service, research companies, printing companies, welding works, and, also, the names of various individuals.

“Apparently, multiple phone installations are a necessary part of the equipment used in disseminating racing information to bookmakers. Testimony was presented indicating that, in some cases, these multiple phone installations result from unauthorized extensions of existing facilities, while in other cases they are made by the telephone companies.

“Exhibits Nos. 16 to 27, inclusive, consist of photographs taken by a sergeant of the Los Angeles Police Department, showing the facilities at some of the wire service drops in Los Angeles. In each of these instances equipment consists of an instrument for receiving information over the telegraph wire and several phones for relaying this information to outside subscribers. These outside subscribers pay for this service at rates varying from \$4.00 per month to \$339.24 per month. There is set out below the rates paid by the eight subscribers to the Continental Press Service previously listed:

<u>Subscriber</u>	<u>Monthly Charge</u>
Tejon News.....	\$144.40
Consolidated Publishing Company.....	63.00
Los Angeles Journalist.....	4.00
George Zouganiles.....	72.27
Arrowhead News.....	65.93
Colton News.....	4.00
Southwest News.....	197.67
Krelling & Cohen.....	339.24

“Additional testimony was presented by police officers as to raids they had made on various locations within the State of California. At some of these locations, including drops on the previously mentioned wire services, it was found that bookmaking was being carried on.

“Testimony was received from representatives of the Western Union, setting out the manner in which these wire services are furnished. Arrangements for the Morse wire used by Continental Press were made in Cleveland, Ohio, and the charges for that lease are paid at Cleveland. The Pioneer News lease, which started October 8, 1945, was arranged for by Stanley Cohen, and, apparently, the main office of Pioneer News is 333 Montgomery Street, San Francisco, California.” (Record, pp. 59 to 65.)

Modern invention has placed into the hands of the criminal element of our society formidable implements, instrumentalities and weapons and the criminal is utilizing these weapons in a manner and with maleficent effect truly representative of the modern atomic age. The so-called “bookie” racket is an example. The law must be realistic and keep abreast of this race to pervert progress in invention to the fell purpose of organized crime. The public interest demands that the law, on its part, be as resourceful and progressive and—if you please—as realistic as are the cynical leaders of the criminal syndicates. The battle between decency and law and order, on the one side, and organized crime, on the other, increases in intensity as mankind progresses on the material plane of existence. The brazenness of this “bookie” racket should be met by the resourcefulness of which the law has shown

itself capable in the past, within accepted and legitimate bounds, but see to it that these legitimate bounds are fully reached and occupied.

We do not take the position that the rules of law should be tortured into special application to meet this threat of organized crime without and beyond the accepted standards of due process and equal protection of the law. We do contend, however, that, while rules and principles of law do not change, the facts and circumstances of a situation may call for a *changed application* of the rules. Power of government does not change but special circumstances may call forth and give rise to legitimate application of a power of government that in different circumstances lawfully could not have been applied.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387; 71 L. ed. 303, 310;

Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 426; 78 L. ed. 413, 422.

As illustrative of the foregoing principle, we quote from the decision of the Supreme Court of the United States in the case of *Village of Euclid v. Ambler*, *supra*:

“* * * Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there

is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall." (272 U.S. 365, 387; 71 L. ed. 303, 310.) (Emphasis by the Court.)

The rule there announced is applicable here. Society is faced with a cankerous evil in this "bookie" racket and the law must apply its power and authority in a manner commensurate to deal with such problem, all of the circumstances and special situations being taken into consideration. The law is not impotent. The law must be stable, of course, but it must not and cannot stand still—it must make progress. The foregoing cited text from the decision of the Supreme Court of the United States in the *Euclid* case would seem to attest the correctness of this view.

The particular situation which the Supreme Court of the United States addressed itself to in the case of *Home Building and Loan Association v. Blaisdell*, *supra*, was that of an emergency but it here may be pointed out that the existence and growth in our body politic of criminal syndicates may well be likened to an emergency which faces society, thus calling forth the existing powers of government to cope with the special circumstances and

conditions with which society finds itself faced. Certainly, the pouring of this racing information into the several States by interstate means, creates an emergency in law enforcement as applied to the individual State. Also, it is a rule of law that government, in fashioning implements and instruments to accomplish a legitimate objective, is given wide latitude in its choice of implements and instruments in light of all the facts and surrounding circumstances and the nature of the evil sought to be abated. It is an elementary rule of law that once it be determined that an objective to be reached is a legitimate one, all necessary and reasonable means may be availed of and employed to accomplish that objective. Government is free to design its instruments in a manner best calculated to achieve a legitimate end and, if such instruments so designed are not clearly unreasonable, Courts should not invalidate them. Courts should be most circumspect to see that there is accorded to government the benefit of every legitimate presumption in approaching the question of the validity and legitimacy of such instrumentalities.

Pacific States Box and Basket Co. v. White, 296 U.S. 176, 185-186; 80 L. ed. 138, 146;

Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 69; 81 L. ed. 510, 518;

Lewis v. Potomac Electric Power Co. (Court of Appeals of D. C.), 64 F. (2d) 701, 702.

In the *Pacific States Box and Basket Company* case, *supra*, the Supreme Court lays this rule down in the following words:

“* * * The order here in question deals with a subject clearly within the scope of the police power. See *Turner v. Maryland*, 107 U.S. 38, 27 L. ed. 370, 2 S.

Ct. 44. When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209, 79 L. ed. 281, 288, 55 S. Ct. 187."

* * * * *

"It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. Compare *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 79 L. ed. 446, 55 S. Ct. 241, and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to stat-

utes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Ins. Co. v. Hyde*, 275 U.S. 440, 447, 72 L. ed. 357, 364, 48 S. Ct. 174." (296 U.S. 176, 185-186; 80 L. ed. 138, 146.)

Also, this rule is restated by the Supreme Court in the *Thompson* case, *supra*, as follows:

"* * * It is settled that to all administrative regulations purporting to be made under authority legally delegated, there attaches a presumption of the existence of facts justifying the specific exercise. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185, 80 L. ed. 138, 146, 56 S. Ct. 159, 101 A.L.R. 853." (300 U.S. 55, 69; 81 L. ed. 510, 518.)

While it is true that the above-cited cases address themselves to a regulation promulgated by an administrative agency, the same rule applies to a rule or regulation promulgated by a public utility, which is filed with a regulatory body and is approved by that body, as is the case with the tariff rule involved in this action. The rule of law with regard to the interpretation and construction of these two types of rules and regulations is the same.

Lewis v. Potomac Electric Power Co. (Court of Appeals of D. C.), 64 F. (2d) 701, 702;

Midland Realty Co. v. Kansas City Power & Light Co., 300 U.S. 109, 114; 81 L. ed. 540, 544.

No rule of law is more firmly established than the principle, which holds that the law will lend no aid to an attempt at its own violation.

Tracy v. Southern Bell Telephone and Telegraph Co. (District Court of U. S., Southern District of Florida), 37 F. Supp. 829.

The *Tracy* case well points out this rule as follows:

“Although telephone companies, as public utilities, are required to furnish their facilities to the public indiscriminatively so long as such facilities are used for lawful purposes, it is well settled that a telephone company may refuse, and cannot be compelled, to furnish service which will be used, or which the Telephone Company has reasonable cause to believe will be used, in furtherance of illegal enterprises. No one can be compelled to aid in an unlawful undertaking. The procuring and placing of wagers on horse races in the manner followed by the plaintiffs is unlawful in Florida. Plaintiffs cannot invoke the processes of a court of equity to restrain defendants from discontinuing a public service which the Telephone Company had probable cause or reasonable grounds to believe is being used in the maintenance and conduct of such illegal or immoral enterprise. *Hamilton v. Western Union Tel. Co.*, D. C., 34 F. Supp. 928; *People v. New York Telephone Co.*, 173 App. Div. 132, 159 N.Y.S. 369; *Godwin v. Carolina Telephone & Telegraph Co.*, 136 N.C. 258, 48 S.E. 636, 67 L.R.A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203; *Smith v. Western Union Tel. Co.*, 84 Ky. 664, 2 S.W. 483; *Bryant v. Western Union Tel. Co.*, C. C., 17 F. 825.” (37 F. Supp. 829-830.)

See also to the same effect:

Hamilton v. Western Union Teleg. Co. (U.S. D.C.—N.D. of Ohio), 34 Fed. Supp. 928, 929.

Appellant contends that furnishing of information concerning horse racing is not unlawful. Such statement tells only a small part of the story involved in this case. Appellant omits to state the *purpose* for which such infor-

mation is furnished and the *knowledge* by the seller that it is to be used for such *purpose*. An otherwise lawful act may be converted into an unlawful one when conjoined to other acts and circumstances seeking *to accomplish an unlawful end*.

Western Union Teleg. Co. v. Foster, 247 U.S. 105, 114; 62 L. ed. 1006, 1016.

It is not unlawful to sell an axe, in and of itself, but, if the seller of the axe knows that the purchaser is purchasing it for the purpose of murdering a man standing on the sidewalk outside the shop door of the seller, would it be contended that the act of the seller is lawful? Suppose a common carrier of passengers should engage in a regular and systematic carriage of persons to a place of assembly for the purpose of organizing a rebellious undertaking against the government, and such carrier knew of the purpose of such passage, could it be contended that the carrier's conduct was lawful or could it be contended that the carrier, lawfully, could not refuse transportation to such conspirators and that courts would direct the carrier to continue to transport persons to such criminal rendezvous? The foregoing are not over-simplifications of the issues involved herein. The appellant, in furnishing the service he does, *knows* for what use it is desired and to what use it is being put and will be put. He *knows* that its use gives rise to a nation-wide gambling system in violation of the laws of many of the States denouncing "bookmaking" as a public offense. He *knows* that it is the breath of life, the sustenance and very existence of the so-called "bookie" racket and the foundation upon which rest the insidious cesspools of crime extending

throughout many of the States, including California, euphemistically denominated "horse parlors," wherein underworld characters forgather in a miasma of law defiance and where organized crime hatches and breeds. Were there no "bookie" operators, there would be no market for appellant's illicit wares. It is these "harmless" and "lawful" undertakings that the appellant's "innocent" service feeds and sustains and he has *full knowledge* of all these facts. If there were ever a case in all history where a petitioner praying for equity entered a Court with, not only unclean hands, but filthy and dirty hands, this is the case. Surely, Equity must have winced and drawn her virginal robes more closely about her, when she perceived the full import of the burden of appellant's complaint praying for the application and intercession of her beneficent ministration.

A reading of the opinion and findings contained in the decision of the Public Utilities Commission (Record, pp. 56-69) will demonstrate the truth of the foregoing statements concerning the "innocent" and "lawful" conduct of appellant.

Appellant, with critical innuendo, speculates in his opening brief (page 32 thereof) as to why the Public Utilities Commission injected itself into this wire service matter by instituting the investigation out of which issued its decision concerning unlawful use of communications service, facilities and instrumentalities. We readily and gladly answer appellant's "speculating" by stating that the Public Utilities Commission is not required to explain to or to notify, in advance, gamblers and "horse parlor"

operators of its intention to discharge its duty under the law. When it became reasonable to believe that communications facilities and instrumentalities within the State of California were being perverted and prostituted to the profit and benefit of criminal syndicates and correspondingly to the detriment of the people of said State and law enforcement, in general, it moved to abate such unlawful use of legitimate instruments of commerce and communication. It will continue in the discharge of its lawful duty concerning this subject, "bookmakers" to the contrary notwithstanding.

III.

TARIFF RULE AND REGULATION FILED BY APPELLEE WITH FEDERAL COMMUNICATIONS COMMISSION IS VALID AND BINDING ON APPELLANT.

The tariff rule and regulation filed by appellee with the Federal Communications Commission, so far as pertinent here (see p. 2, *supra*), is a reasonable exercise by the utility of its power and duty to protect itself from aiding in and abetting the commission of crime. The instrument of protection *must be constructed in light of the evil sought to be protected against*. Obviously, the law does not require a telegraph company to lay itself open to such an extreme hazard, that it subject itself to a charge of aiding and abetting the crime of "bookmaking" before it may lawfully discontinue service or refuse to furnish service. Rules and regulations of this nature (practically identical therewith as to wording) have been upheld in several instances.

Partnoy v. Southwestern Bell Telephone Co. (Missouri Public Service Commission, June 13, 1947), 70 P.U.R. (N.S.) 134, 144, 149. — Rule involved therein is substantially identical with rule involved in this case.

Rodman v. New England Telephone and Telegraph Co., (Massachusetts Department of Public Utilities, November 20, 1945), 61 P.U.R. (N.S.) 242. — Rule involved therein is substantially identical with rule involved in this case.

Carrozza v. New England Telephone and Telegraph Co., (Massachusetts Department of Public Utilities, November 23, 1945), 61 P.U.R. (N.S.) 249. — Rule involved therein is substantially identical with rule involved in this case.

Tracy v. Southern Bell Telephone and Telegraph Co., 37 F. Supp. 829. — Discontinuance upon notification by State Attorney General that service was being put to an unlawful use. No rule or other authority purporting to grant to a law enforcement officer the authority to make such request or demand was involved.

Because of the especial pertinence to this particular subject, we set out in full in this brief as Appendix "A" the decision in the *Partnoy* case, *supra*. Also on this particular phase of the subject, we quote from the decision of the Public Utilities Commission pointing out the positive duty of a communications utility to police its service:

"The right of a person to utility services, such as telephone and telegraph, is not an inherent right but

is due solely to the fact that the State, in the exercise of its police power, has seen fit, under the provisions of the Public Utilities Act, to require the utility to serve the public without undue or unreasonable discrimination. It, therefore, must be concluded that the State, having the authority to compel a utility to render service, has the authority to impose conditions under which such service may be furnished or terminated. (See *Partnoy v. Southwestern Bell Telephone Co.*, Missouri Public Service Commission, June 13, 1947, 70 P.U.R. (N.S.) 134.) It is established by statute in this State that a telephone or telegraph company is not required to accept messages which will 'instigate or encourage the perpetration of any unlawful act * * *' (Section 638, Penal Code.) (Emphasis supplied.)

"It is the positive duty of a communications utility to exercise vigilance to prevent the unlawful use of its instrumentalities and facilities. Such utility exercises a valuable and extraordinary privilege and, in turn, incurs corresponding obligations to the public. Surely, one of its highest obligations is to exercise vigilance to see that its instrumentalities and facilities are not used in aiding and abetting the commission of crime. We are not so naive as to believe that the operators of wire services, as discussed in this decision, can conduct their business of disseminating racing information without general knowledge as to the activities of their customers. The evidence in this case shows that some of the users of these wire services are engaged in bookmaking. The evidence further discloses instances of multiple telephone installations, which installations are aiding the activities of bookmakers. Therefore, we believe that any such installations should be scrutinized very carefully

by the utilities furnishing the services and that additional installations should not be made without careful inquiry as to the nature of their use.

“It is the conclusion of this Commission that communications instrumentalities and facilities should not be furnished to persons who will use them for bookmaking or related illegal purposes; nor should they be furnished where there is strong evidence to indicate that the use will be for such illegal purposes. Neither should the furnishing of such instrumentalities and facilities be continued where reasonable cause exists for believing that such facilities are being so used. There is a duty resting upon communications utilities to refuse installations or to discontinue service when these conditions exist. There is a further duty on the utility to make reasonable inquiry as to the use of facilities and, in particular, this is true where the facilities are being installed in unusual circumstances.” (Record, pp. 67 to 69.)

We wish to here point out that the cases cited by appellant on the subject of authority or lack of authority of a law enforcement officer to request or demand discontinuance or refusal of telephone or telegraph service do not involve a rule or other authority permitting or purporting to permit or authorize a law enforcement officer to request or demand discontinuance or refusal of service, as is the case here. Of course, the absence of a rule or other authority on this point makes all the difference in the world from a legal standpoint.

The case of *People v. Brophy*, 49 Cal. App. (2d) 15, cited by appellant as an authority upholding his position, will illustrate the invalidity of appellant's contention.

The *Brophy* case involved telephone service of the Southern California Telephone Company, which service was purely intrastate. No statute of California authorized a law enforcement officer to demand or request discontinuance of telephone service. No order, rule or regulation of the Public Utilities Commission of that State authorized a law enforcement officer to make such request or demand. No rule or regulation of the utility involved in that case contained any such provision. While it logically may be argued that the act of the Attorney General involved in that case was well within the spirit of the law because of the unlawful use of the telephone service involved, the legal situation is that the courts took a contrary view and would appear to have gone to extreme limits in rendering the decision which was rendered in that case. The demand there made by the Attorney General of the State of California upon the telephone company to discontinue service to alleged "bookmakers" was held by the courts to have been without authority in law.

The vital difference between the situation in the *Brophy* case and other similar cases, upon which appellant relies, and the situation in the instant case is that they did not involve, *as is involved in this case*, a rule or other authority permitting the telephone or telegraph company to discontinue service upon receiving notification by a law enforcement officer that such service is being used contrary to law. The difference between the situation in the *Brophy* case and the situation in the instant case is that the law *authorizes* the doing in the instant case of that which *was not authorized* in the *Brophy* case.

It is elementary that regulatory rules prescribed by regulatory bodies or filed with such bodies by the regulated utilities and by such bodies approved have the force and effect of law and are presumptively valid. A heavy burden rests upon one attacking such rule to demonstrate its invalidity.

Pacific States Box and Basket Co. v. White, 296

U.S. 176, 185-186; 80 L. ed. 138, 146;

Thompson v. Consolidated Gas Utilities Corp.,

300 U.S. 55, 69; 81 L. ed. 510, 518;

Lewis v. Potomac Electric Power Co. (Court of Appeals of D. C.), 64 F. (2d) 701, 702.

It is also an elementary rule of law that, where the claim of unlawfulness of a rule or regulation is grounded in lack of *reasonableness*, the objection on that ground must be addressed to the regulatory authority having jurisdiction to issue or approve such rule and not as an original matter brought to a court.

Ambassador, Inc., v. United States, 325 U. S. 317, 324; 89 L. ed. 1637, 1642.

See also:

N.L.R.B. v. Link Belt Co., 311 U. S. 584, 597; 85 L. ed. 368, 377.

In the *Ambassador* case, the Court stated as follows:

“But we agree with the District Court that where the claim of unlawfulness of a regulation is grounded in lack of reasonableness, the objection must be addressed to the Commission and not as an original matter brought to the court.” (325 U. S. 317, 324; 89 L. ed. 1637, 1642.)

The *Ambassador* case involved a regulation of a telephone company filed with the Federal Communications Commission. This is the exact situation in the instant case with the difference that a telegraph utility is here involved. The principle is exactly the same. The question of whether or not the tariff rule and regulation, upon which appellee relies as a defense, is *reasonable* must be addressed to the Federal Communications Commission and not to the District Court or to this Court. Appellant is free to file with the Federal Communications Commission a complaint against appellee attacking the validity of this tariff rule and regulation. He has not seen fit to do so. Therefore, he is concluded by such rule and regulation, so far as this Court is concerned.

The cases cited on page 26 of appellant's opening brief are not in point at all because no rule was therein involved, so far as reasonableness thereof was concerned. Appellant's assertion that the reasonableness of the tariff rule of appellee is not an issue, herein, does not make such the fact. Of course, appellant wants to ignore this tariff rule.

Appellant appears to be in a quandary as to why the District Court denied him relief. The answer is simple. Under the tariff rule and regulation of appellee, appellant was not lawfully entitled to a continuation of the service theretofore furnished him by appellee. Obviously, the District Court had to deny appellant relief, when it is realized that this tariff rule and regulation became and was a condition of the contract between appellant and appellee covering the wire service in question, being a

part of the application for said service, which application appellant executed.

Appellant, at page 9 of his opening brief, states that the appellee discontinued the wire service in question on April 2, 1948, "pursuant to the order of the Public Utilities Commission of the State of California and the letter of the Attorney General." We wish to point out that this is an incorrect statement of the Record and of the fact. On page 48 of the Record in this case, it is shown that appellee discontinued service on that date pursuant to letters written to it by the Attorney General of the State of California and a District Attorney. The Record does not state that the discontinuance was caused by an order or decision of the Public Utilities Commission. As a matter of fact, the decision of the Public Utilities Commission was not issued until April 6, 1948, and did not become effective until twenty days thereafter. (Record, page 71.)

IV.

JURISDICTION AND AUTHORITY OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

While the validity of the decision of the Public Utilities Commission is not a lawful issue in this case, we, however, desire to point out the legal status of said Commission in the orbit of the State government. By the provisions of Sections 17, 19, 20, 21, 22, 23, and 23a of Article XII of the constitution of the State of California and the Public Utilities Act of said State (Statutes of California 1915, Chapter 91, as amended), said Commission is given plenary and

exclusive authority over public utilities, so far as their supervision and regulation are concerned. (Section 31 of said Act.) It is provided in Section 23 of said Article XII of said Constitution that the "right of the Legislature to confer powers upon the railroad commission" (now Public Utilities Commission) "respecting public utilities is hereby declared to be plenary and to be *unlimited* by any provision of this constitution." (Emphasis supplied.) The same provision is to be found in Sections 22 and 23a of said Article. It will be seen that not only may the Legislature confer on the Commission any and all authority the former may possess over public utilities but may also confer powers upon said Commission that the Legislature itself could not exercise because of constitutional restrictions imposed directly upon the Legislature. The only restraint imposed upon the Legislature and the Commission in this regard, is that afforded by the Federal constitution.

The foregoing constitutional provisions and the Public Utilities Act have received interpretation at the hands of the Supreme Court of the State of California and the plenary authority conferred by the constitution and the Public Utilities Act has been broadly upheld by that Court.

Pacific Telephone and Telegraph Co. v. Eshleman,
166 Cal. 640, 650, 689;

Clemmons v. Railroad Commission, 173 Cal, 254,
258;

City of San Jose v. Railroad Commission, 175 Cal.
284, 290;

Miller v. Railroad Commission, 9 Cal. (2d) 190, 195, 198;

Sale v. Railroad Commission, 15 Cal. (2d) 612.

From the foregoing cited authorities, it is clear that the Public Utilities Commission has plenary and exclusive authority and control over *intrastate* communications service, facilities and instrumentalities, so far as supervision and regulation are concerned.

V.

APPELLANT'S CLAIM OF IRREPARABLE INJURY.

To state it most mildly, appellant has summoned up outstanding hardihood to allege with a straight face that he will suffer irreparable damage, if he is not permitted to continue to ply his trade. If an aider and abettor of law violation may claim irreparable damage when restrained from such unlawful conduct, then appellant stands upon sound legal ground in this case. What appellant is really requesting of the law is that courts place a premium upon the aiding and abetting of law violation. Of course, the fallacy of appellant's position is that he *assumes as a premise* that his activity in operating this "blood bank," "oxygen tent" or "feeder" for the national "bookie" racket *is lawful*. Appellant should remember that no man, lawfully, may claim or base a property right in that which is unlawful.

VI.

DELICACY OF APPELLEE'S POSITION IN THIS CASE.

It is obvious that appellee is not seeking to establish as a fact that it has knowledge that the activity of appellant is an unlawful one, so far as this case is concerned. Appellee's position is a delicate one. On the one hand, it must be vigilant to see that the furnishing of service by it does not result in aiding or abetting unlawful conduct and, on the other hand, it must be careful not to take action that might subject itself to a charge of discrimination in the furnishing of service. Verily, appellee finds itself in the unenviable situation of the ancient helmsman, Glaucus, who was obliged to pass between Scylla and Charybdis. In such difficult circumstances, the law must temper its application to the realities of the case and lend its aid to a public utility that is, in good faith, attempting to perform its public duty and, at the same time protect itself from a charge of aiding and abetting the commission of crime. The position of a public utility in a situation of this nature is difficult enough. Courts should not add to that difficulty by a too technical and legalistic approach to the subject.

CONCLUSION.

We are convinced and most respectfully assert that the facts of this case, interpreted in the light of legal rules and principles cited in this brief, clearly support the

judgment of the District Court and we submit that its judgment should be affirmed.

Dated, San Francisco, California,
October 11, 1948.

EVERETT C. MCKEAGE,
*Attorney for the People of the
State of California
and
the Public Utilities Commission
of Said State.*

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(Appendix A Follows.)

Appendix A.

Appendix A

Missouri Public Service Commission
SIMON PARTNOY DOING BUSINESS AS
HARMONY PUBLISHING COMPANY

v.

SOUTHWESTERN BELL TELEPHONE CO.

Case No. 11,031

June 13, 1947

Complaint by Telephone Subscriber Against Service
Discontinuance at the Request of Civil
Authorities; Dismissed.

By the Commission: Simon Partnoy (hereafter called complainant), an individual, doing business under the fictitious name of Harmony Publishing Company, on March 18, 1947, filed with the Commission his complaint charging that Southwestern Bell Telephone Company (hereafter called Company) intended to and would discontinue his telephone service because it had been ordered by the Honorable Phil M. Donnelly, governor of the state of Missouri, and the Honorable J. E. Taylor, attorney general of the state of Missouri, to discontinue the telephone service to complainant's place of business in the Columbia Bank building in Kansas City, Missouri, for the reason that such telephone service was being used as an instrumentality to violate the laws of the state of Missouri. Complainant further set out in his complaint that he was engaged in the lawful business of disseminating news of horse races and other sporting events by means of telephone equipment furnished by the Company. Com-

plainant further charged that he was not violating any law and that he was paying the required rates for the telephone service he was receiving, and was willing to continue to pay the required rates and asked the Commission to make an order upon the Company, requiring it to continue furnishing the telephonic service to complainant.

On March 18, 1947, the Commission issued its order directed to the Company, ordering it to satisfy the complaint or to answer within ten days. Thereafter, on March 25, 1947, the Honorable J. E. Taylor, attorney general, filed a motion for leave of the state of Missouri to intervene and to be made a party to the cause.

On March 29, 1947, the Company filed its answer, alleging that it had on file with the Commission and in effect a valid and binding tariff rule and regulation which, in part, reads as follows:

Termination of Contracts

* * * * * * *

B. The telephone company shall be authorized to discontinue service upon notice from any official charged with the enforcement of the law stating that such service is being used as an instrumentality to violate the law.

The answer further alleged that on March 11, 1947, the Company received from the governor and the attorney general of the state of Missouri a telegram notifying it that the telephone service being furnished complainant was being used as an instrumentality to violate the law, and requested the discontinuance of such service; that upon receipt of such notice the Company proceeded to

discontinue complainant's telephone service but was restrained therefrom by a temporary restraining order, issued by the circuit court of Jackson county in an action filed therein by complainant, and that after hearing that court issued a temporary injunction pending a hearing and decision by this Commission.

On April 3, 1947, complainant filed a motion to dismiss the motion of the state of Missouri to intervene. Oral arguments of counsel were heard upon complainant's said motion to dismiss and upon the state's petition to intervene, and written briefs were filed by counsel for both parties. After due consideration, the Commission, on April 11, 1947, overruled complainant's motion to dismiss and sustained the motion to intervene and granted leave to the attorney general to file answer on or before April 19, 1947; and in the same order set the cause for hearing on Tuesday, April 29, 1947. Within the time allowed, the attorney general filed answer to the complaint on behalf of the state of Missouri, charging in substance that the aforementioned rule and regulation of the Company for discontinuance of service was reasonable and necessary to the conduct of the telephone business and that the governor and attorney general had joined in a telegram to the company, advising that the service to complainant was being used as an instrumentality to violate the law and requested discontinuance of the service; that the telephone service of complainant was used solely for the purpose of broadcasting information concerning horse races, which information was used exclusively by bookmakers for the purpose of registering bets upon horse races in violation of the laws of the state of Missouri; that complainant

had no customers for this service other than bookmakers, and that the only purpose for the furnishing of the information given out by complainant over the telephones was to aid and assist bookmakers in recording bets and wagers upon horse races in violation of the law.

On April 22, 1947, complainant filed first amended complaint, in all respects the same as his original complaint, except that added thereto was a charge that the discontinuance of telephone service to complainant under the facts charged was without warrant of law, and in violation of complainant's rights under the Constitution of the United States and the Constitution of the state of Missouri. Upon the issues made by the aforementioned pleadings, hearing was held before the Commission at its hearing room in Jefferson City, Missouri, on the 29th and 30th days of April, 1947. At this hearing complainant appeared in person and by his attorneys, Harry A. Terte, Julian M. Levitt, Edward Hieby, Roy W. Rucker, all of Kansas City, Missouri, and Louis H. Cook of Jefferson City, Missouri. The Company appeared by its attorneys, John Mohler of St. Louis, Missouri, and Arthur S. Brewster of Kansas City, Missouri. The state of Missouri appeared by J. E. Taylor, Attorney General, Art O'Keefe and Pershing Wilson, Assistant Attorneys General.

The evidence produced to support the complaint was the testimony of complainant himself and a number of metropolitan newspapers that were introduced in evidence as exhibits. The complainant testified in substance to all of the facts set out in his complaint. He further testified that for the news service which he gave over the telephone facilities of the Company, he received from \$50 to \$100

per customer per week; that he had nine customers; that one paid \$50 per week, some paid \$60, some paid \$75 and some paid \$100 per week; that he used, in all, ten telephone lines; that the reason he had ten telephone lines but only nine customers, was because he always held one line open so that customers could call in and obtain service when they wanted it.

It was brought out on cross-examination that complainant received the sports news by Morse code telegraph ticker from Trans-American News Service in Chicago; that complainant's telegraph operator posted the information received on a bulletin board and from there it was read off by another operator over the telephones when a customer called in and asked for the service. If several customers were receiving service at the same time, the telephone transmitter connected with each line was placed in a box or on a rack, and the information was broadcast to these transmitters by loud-speaker; that some customers would call in for certain information which would be given them and then would hang up; that others would ask to hold on and sometimes as many as six telephone lines were receiving the broadcast from the loud-speaker at the same time; that the first news was received and given out over the telephones about 11 A. M. of each day except Sunday. The principal news handled was that of horse racing and consisted of: First, the lineup for the day's races at the various race tracks throughout the country, the scratches, the jockeys, the condition of the track, and the betting odds. As the time for the various races approaches, the changes in odds are given, and this is followed by a description of the running

of the race, giving the positions of the horses, the winners, the running time, and the mutuels.

In addition to this racing news, complainant also gives the news of major league baseball games by innings, football and basketball games by periods when in season, and other major sports events. It also published and distributed a sport sheet known as "Sport Ray." He has been connected with this kind of business for about twenty-three years, has been in business at his present location and under his present name for about four years. From 1940 up to the time he established his present location, he had his business at a place known as "Green Hills" in Platte county, several miles north of Kansas City. Prior to that he was in business at Kansas City, Kansas, for awhile, and prior to that in the New York Life building in Kansas City, Missouri, for a number of years. He moved from Kansas City, Kansas, back to Missouri after his Western Union Telegraph Company service had been cut off because the Federal government charged that the service was being used to violate the law. Following this, complainant filed an injunction suit against the Western Union Telegraph Company in the United States district court at Kansas City, and the court denied the injunction and dismissed the petition.

Complainant further testified that, in addition to this news service by telephone which he furnished in Kansas City, he also furnished a similar news service by teletypewriter to a customer in St. Joseph, Missouri, another in Wichita, Kansas, another in Omaha, Nebraska, another in Lincoln, Nebraska, another in Sioux City, Iowa, another in Council Bluffs, Iowa, and another in Tulsa, Oklahoma.

Complainant's books pertaining to his business, which he produced at the request of the attorney general, showed that for these various teletypewriter services, he received anywhere from \$100 per week from the St. Joseph customer, to as high as \$450 per week from the customer in Omaha, Nebraska. He further testified that he had the exclusive agency for this news service in western Missouri and the states of Iowa, Kansas, Nebraska, and Oklahoma, and that his service was the only service of that kind obtainable in all that territory. The books also showed the names of complainant's customers in Kansas City and in each of the other cities mentioned. Those in Kansas City who received the news service by telephone were listed on the books by last name followed by an initial, such as "Looney, R," "Doyle, J," "Green, B," etc. Complainant claimed that he did not know any of his customers personally nor their addresses; that they usually contacted him by telephone if they wanted his service, a few came to the office, and, when the price was agreed upon and payment was made in advance, the customer was assigned a number such as 1, 2, 50, etc., and as long as he continued to pay for this service weekly in advance, he was given the service whenever he called in and requested same; that when any customer wanted service, he would call one of the telephone numbers of complainant's telephones and give to the operator in complainant's office the number which complainant had assigned to that customer, and then state what service he wanted; that is, whether he wanted specific information only or wished to be put on the rack for a period of time to receive the broadcast of the news over the loudspeaker.

The Company assigned to complainant's telephones numbers as follows: Grand 2750 to 2756, inclusive; Grand 2852 and 2853, and Grand 2879. If Grand 2750 is dialed, then any of the following successive numbers where the line is not in use will automatically be called. Likewise, if Grand 2852 is dialed and that line is busy, the 2853 will automatically be rung.

Complainant further testified that the advance payments for the service to his Kansas City customers were made by check delivered to his office through the United States mails; that the customer in each instance put the number assigned to him upon his remittance check and also on the outside of the envelope, and upon receipt of the envelope containing the check, complainant looked at the number on the envelope and on the check to determine who was making the payment, and then sent the checks to the bank; that he paid no attention to the signatures on the checks, did not look to see what the signature might be, but only looked for the number; that he did not know who signed any of the remittance checks.

Complainant also stated that he had had substantially the same customers for some time; that occasionally a customer would discontinue the service or would quit paying in advance and complainant would cut off the service, but that he usually had the full nine customers and on one occasion he had had ten customers; but that when a customer dropped off or quit the service, another customer would be put on; that he did not have any waiting list of customers, made no efforts to advertise or sell this service, but that when there was a vacancy on any line,

somebody would just call in and ask for the service and would be assigned a number and given the service as requested. No explanation whatever was offered as to how these prospective customers could find out that there was a vacancy. Complainant stated that he had no connection with bookmaking places, that no bets were taken or recorded at his place of business, and that in all of his twenty-three or twenty-four years in business he had only been in one bookmaking place, and that was a place in Kansas City about 1937 or 1938, and that this place, when he was in there, was getting information such as complainant furnishes his customers.

When asked what kind of a business other than a bookmaking establishment would want complainant's service, he said, "I don't know." He was then confronted with the following questions and made the following answers:

Mr. Taylor: You don't know of any, is that your answer?

A. I just don't know whether it could be used in a bookie joint or not.

Q. I will ask you if I didn't ask you this question and you didn't make this answer at the hearing before Judge Cook: (Reading) "Can you tell me any kind of business other than a bookie business that would want this service?" Answer: "No."

A. I might have made that answer but I had just come from the hospital where my wife was operated on just before the testimony there.

Q. You were confused?

A. Very confused. My wife was in surgery for an hour and a half that same morning.

Q. But you wouldn't say you didn't make that answer?

A. If the record shows that, I probably did, but I didn't mean it that way.

Q. Well, can you tell me again—you are not confused now, are you, Mr. Partnoy?

A. I don't know what it could be used for.

Q. You don't know what it could be used for.

A. No, sir.

In connection with complainant's testimony as to his one venture into a bookmaking establishment, and reflecting upon his knowledge of the use made of his news service, he was asked the following questions and made the following answers:

Q. You testified at the hearing before Judge Cook recently?

A. Yes, sir.

Q. I will ask you if I didn't ask you this question and you made this answer: (Reading) "So contrary to anything that may be alleged in the petition, you did know that the service which you were working with was being used by book joints at that time?" Answer: "That is right." I will ask you if that question wasn't asked and you didn't make that answer.

A. Maybe I made it, but I didn't mean to make it in that manner.

Complainant denied any knowledge of raids by law enforcement officers upon bookmaking places and denied any knowledge that such raids might affect his business or cause him to lose customers. He denied any knowledge

whatever of the business of any of his customers, but in that connection he was asked the following questions and made the following answers:

Q. I will ask you if at the hearing before Judge Cook I didn't ask you this question: "Would you tell the court that in the twenty-four years, or however many years it has been, that you don't know a single customer at that time or what business they were engaged in?," and you made the following answer: "I think I told them in 1938 I had went to places where they had this rapid information, they were bookmakers." Did you make that answer?

A. I might have made it, yes, I probably did, but I didn't mean it that way.

Following complainant's testimony, a number of metropolitan newspapers published in some of the major cities throughout the United States were offered in evidence, for the stated purpose of showing that such newspapers carried the same news and information as was given by complainant over the telephones. With this showing, complainant rested.

The Company called as a witness H. D. Boyles, who testified that he is general commercial engineer for the Southwestern Bell Telephone Company, and that a part of his duties is the designing of rate schedules and rules and regulations to be filed in the tariffs filed with this Commission and the Federal Communications Commission. He further stated that the rule involved in this case is a 1943 rewrite of a previous rule dealing with the same subject, which has been in effect since 1919; that this rule or a similar rule was deemed advisable by the

Company to protect it against the possibility of criminal prosecution as an accessory for furnishing telephone service used to violate the law, and to protect the Company from civil liability should it comply with a request such as was made by the governor and attorney general in this case.

Following this testimony, the Company offered in evidence the telegram from the governor and attorney general and rested its case.

The attorney general called as his first witness one James B. Smith, who testified that he was employed by complainant; that Partnoy had four employees; that it was the duty of the witness to answer the telephones and give the customers the desired information, and that if more calls came in than he could answer in the usual manner for use of the telephone, he put the telephones on the rack or in the box and broadcast the news to them over a loud-speaker; that when a customer called in for service he would give the number that had been assigned to him and ask for what he wanted. Generally, this witness described the conduct and character of the business about the same as it was described by complainant.

Next followed the testimony of ten law enforcement officers, either members of the Kansas City police force or the state highway patrol, who testified about various instances when book making establishments in Kansas City, North Kansas City, and Green Hills, in Platte county, were visited and later raided, or raided without a previous visit. All this evidence showed beyond question that the unlawful business of taking bets and mak-

ing books upon horse races was being carried on at these various places, and that these places were receiving the news and information concerning horse races and betting thereon by use of telephone equipment of the telephone company, and that the information being used and received at these various bookmaking places was information of the same character and import as that given by complainant over the telephone.

In some instances the telephone instrument in the bookmaking establishment had hooked into it earphones. In other instances connections were made with a loud-speaker system. Various pieces of evidence of bookmaking on horse races were found in each of the raids, such as pin-up sheets, recordings of bets and various other equipment used generally by bookmakers; even sizable sums of money. These raids were at various times from 1942 down to as late as March of this year. Members of the state highway patrol testified that on two different occasions they visited at Green Hills, in Platte county, and saw the bookmaking establishment there in full operation, with a number of people present as customers, placing bets on horse races at various windows for that purpose, and receiving the broadcast of the news of races being run at various race tracks, and bets being paid to various of the customers after the races had been run. There were many other details of these raids shown in the evidence that are not discussed because we think it sufficient to say that there was ample evidence of unlawful activity, and various of these raids resulted in arrests and convictions in municipal court for gambling.

At one bookmaking establishment in Kansas City, where a raid was conducted, there was found in the drawer of a desk numerous tickets showing bets on various horse races, and also a card on which was listed ten telephone numbers, three of which were the numbers of telephones used by complainant.

The attorney general's last witness was the manager of the business office of the Company in Kansas City, who testified to the numbers of the telephones used by complainant, and that of all the telephones used by complainant only one was listed in the telephone directory, that being Grand 2750. If that number were dialed, it would automatically ring any of the phones of the number series of 2750 to 2756, inclusive, in the order of their numbers, if the lower numbered lines were busy. He further testified that the numbers of the telephones used by Partnoy, which were not listed in the directory, could not be obtained from the telephone company and would not be given out by the Company to anyone except upon compulsion by legal process.

All of the parties to this cause were granted leave to file written briefs and did file exhaustive and enlightening briefs, which have been a great aid to the Commission in determining the issues involved. As we view it, there are two questions presented for decision. The first question presented is the validity and reasonableness of the Company rule involved. The second question is the propriety of the application of the rule under the facts in this case. Other legal points have been raised by the

parties but we believe that these will be disposed of as incidental to these two main questions.

Taking up first the validity and reasonableness of the rule, we look to the applicable Public Service Commission Laws (Mo Rev Stats 1939, Chap 35, Arts 1 and 5).

Section 5592, Art 1 of Chap 35, Rev Stats Mo 1939, dealing with the jurisdiction of the Commission over public utilities, provides in part as follows:

“Jurisdiction of Commission.—The jurisdiction, supervision, powers, and duties of the Public Service Commission herein created and established shall extend under this chapter: . . .

“6. To all telephone lines, as above defined, and all telegraph lines, as above defined, and to every telephone company, and to every telegraph company, so far as said telephone and telegraph lines are and lie, and so far as said telephone companies and said telegraph companies conduct and operate such line or lines, respectively, within this state. . . .

“9. To all public utility corporations and persons whatsoever subject to the provisions of this chapter as herein defined. And to such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly.”

[1] In addition to certain positive powers expressly conferred upon the Commission, it is also vested with all other powers necessary and proper to carry out fully and effectively the duties delegated to it. State ex rel. and to

Use of Public Service Commission v. Padberg (1940) 346 Mo 1133, 145 SW2d 150.

[2] The authority of the Commission is referable to the police power of the state, which power may never be abridged. *State ex rel. and to Use of Public Service Commission v. Blair* (1940) 347 Mo 220, 146 SW2d 865.

[3] As an incident of the Commission's regulation of its business, and particularly due to the provisions of §§ 5664 and 5665, Art 5 of Chap 35, Rev Stats Mo 1939, dealing specifically with service, just and reasonable charges, unjust discrimination, unreasonable preference, and rate schedules, the Southwestern Bell Telephone Company on September 22, 1943, filed with the Commission, as one of its tariff provisions dealing with the termination of contracts, the rule or regulation heretofore mentioned as containing the following language:

The telephone company shall be authorized to discontinue service upon notice from any official charged with the enforcement of the law stating that such service is being used as an instrumentality to violate the law.

No objection having been made to said rule or regulation, within due time the same became entitled to be accorded the force and effect of law, binding upon the utility, the public, and the Public Service Commission. *State ex rel. Western U. Teleg. Co. v. Public Service Commission* (1924) 304 Mo 505, PUR 1925A 610, 264 SW 669, 35 ALR 328; *State ex rel. St. Louis County Gas Co. v. Public Service Commission* (1926) 315 Mo 312, PUR 1927A 187, 286 SW 84; *Midland Realty Co. v. Kan-*

sas City Power & Light Co. (1937) 300 US 109, 81 L ed 540, 17 PUR NS 113, 57 S Ct 345.

[4] Such rule and regulation also became the pronouncement of the public policy of the state, acting through the Public Service Commission as an arm of the state legislature in the particular field of public utility regulation. State ex rel. and to the Use of Cirese v. Ridge (1940) 345 Mo 1096, 34 PUR NS 454, 138 SW2d 1012.

None of the parties, including the complainant, challenges the fundamental jurisdiction of the Commission to make rules and regulations respecting the control of the Company and its relationship to the public as a regulated utility. However, the complainant urges that said rule is unreasonable, arbitrary, oppressive, and unjust, and faulty from its inception because it is of such a nature as to deprive him of certain property rights without due process of law as guaranteed by both the Fourteenth Amendment to the Constitution of the United States and Art I, § 10, of the Constitution of the state of Missouri.

[5] In so far as the complainant's attack on said rule and regulation is concerned, we must rule against the complainant. Said rule operates to relieve the regulated Company from being placed in the dilemma of choosing either the course of continuing service under threat of criminal prosecution as an accessory, if the complainant is actually guilty of a crime, or discontinuing service under the threat of civil liability in the event the accusations are wrongfully made by the enforcement officers.

In the case of *Tracy v. Southern Bell Teleph. & Teleg. Co.* (1940) 38 PUR NS 527, 528, 37 F Supp 829, the court states:

“Although telephone companies, as public utilities, are required to furnish their facilities to the public indiscriminately so long as such facilities are used for lawful purposes, it is well settled that a telephone company may refuse, and cannot be compelled to furnish service which will be used, or which the telephone Company has reasonable cause to believe will be used, in furtherance of illegal enterprises. No one can be compelled to aid in an unlawful undertaking. The procuring and placing of wagers on horse races in the manner followed by the plaintiffs is unlawful in Florida. Plaintiffs cannot invoke the processes of a court of equity to restrain defendants from discontinuing a public service which the Telephone Company had probable cause or reasonable grounds to believe is being used in the maintenance and conduct of such illegal or immoral enterprise.” (Citing numerous cases.)

[6] The Company is not a law enforcement agency and upon being advised by law enforcement officials that its service is being used as an instrumentality to violate the law, it appears only proper that it should have the right to rely on notice from such law enforcement officials as reasonable to believe its service is being improperly used. The rule in the instant case only operates to such effect. As will be noted, said rule does not make it mandatory that the Company terminate such service upon such notice. The rule still leaves the way open for the

Company to continue service if it deems said law enforcement officials to be acting unreasonably and capriciously. In the instant case, we have the governor and attorney general of the state of Missouri notifying the Company that its service is being used to violate the law, with the result of the Company's terminating its service, pursuant to the established rule and regulation above mentioned. That the Company should have the right thus to proceed appears much more reasonable than to burden it with deciding the ultimate fact of whether or not said service is being used as an instrumentality to violate the law, and in the interim being confronted with a charge of criminal liability while continuing service or otherwise discontinuing service under threat of civil liability. Since the Company is a public utility and strictly regulated as such as to all its operations affecting service, it appears reasonable and in the public interest that it be afforded that measure of protection which the rule and regulation affords.

[7-10] Obviously, said rule is not discriminatory as it operates uniformly with respect to all members of the public availing themselves of the company's service. Unless said rule itself is invalid every subscriber contracts for his service upon condition that said service may be cut off under certain circumstances and with actual or constructive knowledge that the right to such service is not an absolute and unconditional one. Even in the absence of such rule there appears no doubt as to the right of the Company to terminate its service, if said service is being used as an instrumentality to violate the law,

and even in the absence of such rule the right of any subscriber to service is always conditional. *Hamilton v. Western U. Teleg. Co.* (1940) 36 PUR NS 38, 34 F Supp 928. Said rule in itself cannot be held to deprive the complainant of his property, i.e., the right to telephone service without due process of law, unless the action of the company in cutting off complainant's service under said rule also operates to leave the complainant without recourse in the event said service has been terminated without justifiable cause. Thus, in the instant case, the complainant was afforded the opportunity to show that the notice given by the governor and attorney general to the company was unsupported by fact, and the Commission in the exercise of its control over the Company is empowered to order said service restored, or to be more exact, order that said service be continued since the complainant has already invoked legal process to enjoin its termination, despite his argument that said rule denies him due process of law. The further situation exists that any finding of this Commission is also subject to further review by the courts and thus said rule and regulation in no manner denies the complainant a full and adequate remedy before the courts and due process of law is preserved. As was stated in *St. Louis v. Missouri P. R. Co.* (1919) 278 Mo 205, 211 SW 671:

“All that is meant, in the abstract, by due process of law, despite the numerous definitions of same, is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general law which governs society, and in the concrete, that in a contest in regard to these rights, he will be accorded the opportunity

to contest the propriety of each step in the action sought to be taken against him. The doctrine thus clearly enunciated, found its most unequivocal utterance in the Dartmouth College Case (1819) 4 Wheat 518, 4 L ed 629, which has been frequently affirmed.”

[11] Since said rule in itself in no wise operates to deny subscribers the right to test its application to their particular use of the telephone service in the event the right to such use is challenged by law enforcement officials, one remaining question as to its validity might turn on the point of said rule and regulation being such as can be lawfully enacted under the state’s proper police power, as an encroachment upon the private right of its citizens to exercise exclusive dominion over their property and contract freely about their affairs. It appears to be somewhat an anomaly that any right to the service, which the complainant now maintains is being denied him by reason of the rule and regulation in force, only exists as a matter of right in the first instance by virtue of the state’s exercise of its police power in assuming to regulate the Company as a public utility. In other words, the very service which the complainant now insists is due him as a matter of inherent right, is not an inherent right at all, but is due solely to the fact that in the exercise of its police power the state has previously seen fit, under provisions of the Public Service Commission Act, to require the Company to serve the public without undue or unreasonable preference.

The right of the state, in the exercise of its police power to compel a public utility to serve the public

generally and to operate its business subject to reasonable rules and regulations, is now so well established under the law of the land that citations of authority to such effect would be merely surplusage. Without regulation, no obligation could be imposed upon the Company to furnish the complainant any service. Being under regulation and thereby required to render its service to the public under such reasonable rules and regulations for the conduct of its business as are not in conflict with any duty or liability imposed upon it by law, the Company has filed the rule in question as a measure of self-protection in the conduct of its business. It may very well be argued that this rule is a wholesome one because it operates as a deterrent to criminal activity, but whatever merit there may be in the point it should be noted that we are not sustaining the rule upon that restricted basis.

[12] As so filed and approved, said rule and regulation has the force and effect of law and the same status as if promulgated by this Commission in the first instance. Having the right to compel the Company to render service, it clearly follows that the state has the right to enact conditions under which such service may be terminated. In *Nebbia v. New York* (1934) 291 US 502, 78 L ed 940, 950, 2 PUR NS 337, 345, 54 S Ct 505, 89 ALR 1469, wherein the court exhaustively discusses many examples of the proper broad exercise of police power, the court states:

“The reports of our decisions abound with cases in which the citizen, individual, or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power.

“The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest.”

This Commission, under all the facts to be considered and the law applicable thereto, can see no cause for now determining that the rule and regulation in question is arbitrary, capricious, unreasonable, and unjust, or that the same is contrary to either the Federal or state Constitution. In seeking to have this Commission disapprove and abrogate the above-quoted rule, it might also be pointed out that complainant introduced no evidence sufficient to sustain the burden of proof cast upon him by virtue of the provisions of §§ 5702 and 5703, Rev Stats Mo 1939, *State ex rel. Kennedy v. Public Service Commission* (Mo Sup Ct 1931) PUR1932B 504, 42 SW2d 349. Any issues regarding the reasonableness and validity of said rule and regulation must be ruled against the complainant and in favor of the intervening state of Missouri and defendant Company.

Having concluded that the rule in question is a valid and reasonable rule, we now come to the consideration of the question of the propriety of the application of the rule under the facts in this case, and find several factors that must be considered.

[13] Horse racing in the state of Missouri is not unlawful; neither is it unlawful to disseminate news of horse racing, but bookmaking and registering bets upon horse races is unlawful and is made a felony by each of two different enactments of the legislature. Missouri Rev Stats 1939, §§ 4673 and 4674. This we pointed out in *Pioneer News Service v. Southwestern Bell Teleph. Co.* (1945) 61 PUR NS 47.

If we were to believe complainant's testimony in its entirety, we would be compelled to declare his business lawful, but we are not so gullible as to believe that a business of this kind conducted for profit could or would be conducted in the manner described by complainant, with no knowledge of his customers nor the uses which they were making of the service. We think the evidence clearly establishes that the bookmakers in Kansas City were using the telephonic news service of complainant as a necessary adjunct to their unlawful business. We can understand how a loud-speaker broadcast of the changing betting odds immediately preceding the running of a horse race and a description of the race, from the time the horses leave the starting pens until they cross the finish line, would add to the thrill and stimulate betting, and at the same time give the information that is essential to registering and paying bets.

If complainant knew the use that was being made of his telephonic news service, and there was no other use for his service except that of bookmaking, then he has approached, if not reached, the position of an accessory to the commission of a felony. Stating it otherwise, if this news service of complainant had no other use than to aid and abet in carrying on the unlawful business of bookmaking, and if complainant rendered the service with knowledge of these facts, then his telephone service was being used as an instrumentality to violate the law within the meaning of the Company's rule.

The evidence shows that complainant had the exclusive agency for the dissemination of his news service in Kansas City and western Missouri, and that no one else

was rendering such a service in that territory. All the bookmaking places raided by the Kansas City police and the state highway patrol were receiving racing news over the telephone. At the trial of an injunction suit before Judge Cook of the circuit court of Jackson county, complainant testified that he could not think of any kind of a business other than a booking business that would want his service. When confronted with that testimony, he did not deny it, but attempted to excuse it by saying that he did not mean it that way and that at the time it was given he was confused. Complainant also admitted that at this same hearing before Judge Cook, he testified that he knew that his service was being used by "book joints." This also he attempted to excuse upon the ground of confusion. He also admitted that in his testimony before Judge Cook he stated that in 1938 he went to places that were receiving this rapid news service and that they were bookmakers, but also sought to excuse this testimony by saying he was confused when he so testified.

Testimony of this kind given before Judge Cook is not only revealing upon the question of complainant's knowledge of the unlawful use of his service, but is not compatible with the ignorance of his business which complainant professed at the hearing before this Commission. We think this evidence is sufficient to establish guilty knowledge upon the part of complainant. Even without this testimony by complainant, we think the record as a whole justifies the inference that complainant knew that his service was used exclusively by bookmakers. We are convinced, from all the evidence, that complainant's service had no purposes other than to aid and abet the carry-

ing on of an unlawful enterprise; therefore, we conclude that the charge of the governor and attorney general, that complainant's telephone service was being used as an instrumentality to violate the law, was founded upon truth and fact and that the Company acted with propriety in applying the rule to complainant.

[14] Had the Company had no such rule, we still think, as pointed out in *Pioneer News Service v. Southwestern Bell Teleph. Co. supra*, that the Company could, with propriety, cut off complainant's service when it found the service was being used in the furtherance of an unlawful enterprise, and we would have approved such action by the Company in this case, had it not had its rule.

While this question has not been passed upon by the appellate courts of Missouri, other courts have considered the question under comparable facts and we believe the weight of authority throughout the United States supports our views. *Giordullo v. Cincinnati & Suburban Bell Teleph. Co.* (1946)—Ohio Op—, 68 PUR NS 269, 71 NE 2d 858; *Howard Sports Daily v. Public Service Commission* (1941) 179 Md 355, 38 PUR NS 197, 18 A2d 210; *People ex rel. Restmeyer v. New York Teleph. Co.* (1916) 173 App Div 132, 159 NY Supp 369; *Shillitani v. Valentine* (1945) 269 App Div 568, 60 PUR NS 382, 56 NY Supp2d 210; same case (1947) 296 NY 161, 67 PUR NS 150, 71 NE 2d 450; *Tracy v. Southern Bell Teleph. & Teleg. Co.* (1940) 38 PUR NS 527, 37 F Supp 829; *Fogarty v Southern Bell Teleph. & Teleg. Co.* (1940) 35 PUR NS 296, 34 F. Supp 251; *Smith v. Western U. Teleg. Co.* (1887) 84 Ky 664, 2 SW 483; *Godwin v. Carolina Teleph. & Teleg. Co.* (1904)

136 NC 258, 48 SE 636, 67 LRA 251, 103 Am St Rep 941, 1 Ann Cas 203; *Western U. Teleg. Co. v. State ex rel. Hammond Elevator Co.* (1905) 165 Ind 492, 76 NE 100, 3 LRA NS 153, 6 Ann Cas 880.

[15] Complainant raises the point that the Company rule in its application to him constitutes a taking of his property without due process of law in violation of the Constitution of the United States and the Constitution of the state of Missouri. As heretofore pointed out, the fact that the Company's action under its rule opened the door of this Commission for the filing of the complaint under consideration, in our judgment serves the requirements of due process.

Being of the opinion as heretofore expressed, it is, therefore,

Ordered: 1. That the complaint of Simon Partnoy, an individual doing business as Harmony Publishing Company of Kansas City, Missouri, against the Southwestern Bell Telephone Company, be and the same is hereby dismissed.

Ordered: 2. That this order shall become effective on the 24th day of June, 1947, and the secretary of the Commission shall serve certified copies hereof upon all interested parties in the manner provided by § 5601, Rev Stats Mo 1939.

No. 11969

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD J. McBRIDE, doing business as Continental Press
Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corpo-
ration,

Appellee.

APPELLANT'S REPLY BRIEF.

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Attorney for Appellant.

FILED

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Appellee.

APPELLANT'S REPLY BRIEF.

Appellee's reply brief shuns practically all of the propositions of law advanced by Appellant in his opening brief and seeks to divert attention to the two main propositions upon which Appellee relies. Those two propositions are: (1) That by signing the application, Appellant expressly contracted that Appellee could discontinue the leased wire service upon receipt of notice from a law-enforcement agency, and (2) that by reason of Tariff Regulation No. 219, the District Court did not have jurisdiction. Appellant has fully demonstrated in his opening brief that the District Court does have jurisdiction under Section 406 of the Federal Communications Act.

In so far as the alleged contractual relationship is concerned, Appellee's brief appears to have the aspects of a

plea of confession and avoidance. Appellee confesses that the service was discontinued by it when it received notice from the law-enforcement agencies of California, but seeks to avoid a hearing and determination of the merits of such notice. In other words, Appellee does not wish to meet the issue as to whether or not Appellant is actually engaged in a legal business.

Point I of Appellee's brief strenuously urges that the mimeographed application for service signed by Appellant was a legally enforceable contract. Apparently Appellee seeks to persuade this court that since the application contained a provision permitting Appellee to discontinue the service upon receiving notice from law-enforcing agencies that the service was being supplied contrary to law, Appellant is without remedy to compel restoration of the service, irrespective of whether the claim of such agencies was with or without substance.

Appellee concludes:

"It is, of course, elementary that one who has by contract or otherwise expressly authorized an act or course of conduct, may not invoke equitable relief against the normal consequences thereof." (Appellee's Br. p. 8.)

Appellee attempts to transform an ordinary application into a contract, which is not a contract in the legal sense because it lacks mutuality of obligation. Only an agreement which is binding on both parties can have the force of a contract. The application signed by Appellant as customer for Appellee's service could not bind Appellant to receive the service, and Appellant could at will refuse to accept further service even if the express terms of such purported contract were to the contrary. Appellee, on the

other hand, as a public utility, is bound by law at all times to hold out or offer its service to Appellant or any other customer. See:

Southern Express Co. v. R. R. Co., 99 U. S. 191,
25 L. Ed. 319;

Rust v. Conrad, 47 Mich. 449, 11 N. W. 265;

Fowler Utilities Co. v. Gray, 168 Ind. 1, 79 N. E.
897.

Appellee's contention that the application is a contract barring him from seeking relief is without support. The following cases cited by Appellee do not justify such a contention:

Freeman v. Scherer (Kan. 1916), 154 Pac. 1019,
1022;

Stewart v. Hovey (Kan. 1891), 26 Pac. 683;

Downs v. Board of Com'rs (Kan. 1892), 29 Pac.
1077;

Lester v. Sullivan (Ky. 1908), 107 S. W. 300, 301.

An inspection of these cases reveals that they are in no way related to the instant controversy. Each case cited stands for the simple proposition that he who seeks equity must do equity, and that one who invites and encourages a wrong cannot thereafter ask a court of equity to protect him by an injunction from the consequences of that wrong.

There is clearly no question in the instant controversy that concerns contractual obligations between the parties. The relationship between Appellant and Appellee, as noted, is not one of contract but one of relational duties imposed by law. Appellee is a common carrier and is prohibited from making any contract by which its power to perform

its public function would be impaired. Nor can it by contract with an individual or group of individuals avoid the performance of a duty owed to the public.

Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U. S. 566, 65 L. Ed. 1094;

Union Dry Goods Co. v. Ga. Public Service Corp., 248 U. S. 372, 63 L. Ed. 309;

Correll v. Ohio Bell Telephone Co., 63 Ohio App. 491, 27 N. E. 2d 173;

Ala. Water Service Co. v. Wakefield, 231 Ala. 112, 163 So. 626;

In re Doss, 41 Cal. R. R. Com. Reports, 359.

In the *Union Dry Goods Co.* case, *supra*, Plaintiff had a 5-year contract for utility service at a fixed rate of compensation. After the contract had been entered into, the State Commission authorized the utility to charge higher rates and the utility sent the plaintiff a bill for the increased charge. Plaintiff claimed that the act of the utility commission in authorizing higher rates was an impairment of the obligation of his contract in violation of the Federal Constitution. The Court held that the duty of a public utility is to furnish service to all persons without discrimination and that the relationship between the public utility and its customers is not one of contract as the term is generally understood.

Correll v. Ohio Bell Telephone Co., *supra*, at page 174:

“A public utility is, by law, regulated strictly in its operation. Rights and privileges which it might seek under ordinary contractual relations are curtailed by provisions of the statutes. Its liabilities are likewise

regulated and limited by statute. The theory is this that, since it renders a service affecting the public, the state shall regulate and control it in order to prevent injustice, and, further, in consideration of such regulation and control, its liability is and should be defined and limited. In a sense it is a matter of contract, on the one hand by the utility, and on the other by the state representing all its citizens."

In *Ala. Water Service Co. v. Wakefield*, *supra*, the Court states:

"The regulation of the Public Service Commission requiring a contractual relationship between company and customer to be entered into as an initial step to obtain water service is for an orderly conduct of the business. When such regulation is complied with, the service installed, and the customer meets his obligation under the regulations from time to time, the duty of furnishing service is a public duty, a law-made duty, a breach of which is a tort, wherever the measure of damages is governed by the rules of tort action."

In *In re Doss*, *supra*, the California Railroad Commission ruled with respect to stereotyped contracts for service entered into between a common carrier and its customers (p. 363):

"Respondent appears to believe, however, that if he holds written contracts with all his patrons he may thereby avoid common carrier status and remain within the category of a contract carrier. This is not necessarily true. The essential test of a common carrier is a public holding-out or offer of service. Such a holding-out may exist even when written contracts are made with all shippers or receivers served * * *.

But in the absence of such limitation of service or withholding of public dedication, the essential common carrier nature of the operation is not altered or successfully disguised by the use of any written contracts, whatever may be their form.” (Emphasis supplied.)

Williston on Contracts, Vol. I, Sec. 32A, at page 81:

“A century ago it was endeavored to compress under the head of contractual obligations many duties which, in this country at least, are now recognized as falling within those common-law relational duties imposed by the law, rather than assumed by the mutual assent of the parties. These are characterized by their correlative names, representing the reciprocal character of the obligations thrust upon those who enter into one of these common-law relationships of everyday community life, such as * * * public service proprietor and patron, *e. g.*, common carrier of goods and shipper, or innkeeper and guest. It is true that the creation of these relations may be, and quite generally is, co-existent with a contract between the parties with respect thereto, but in practically all jurisdictions *these relations are distinguished from true contract in certain particular. The distinguishing feature is that certain respective rights and duties are defined by law and imposed upon the parties without any question of their knowledge of or assent to these specific terms.*” (Emphasis supplied.)

51 *Corpus Juris* 6:

“A utility has no power, however, to make any contract in contravention of public policy, or by which its power to perform its public functions will be impaired, and so it cannot, by contract with another corporation or individual, avoid the performance of of a duty owed to the public, * * *”

It would thus seem that Appellee's argument is without merit, and that Appellant is not precluded from seeking judicial relief for his injuries by reason of his having signed the purported contract for service. Appellant signed the application because it was required that a customer sign such application as a condition precedent to receiving the service requested. Appellant certainly did not intend to enter into any arrangement whereby he would be prevented from thereafter seeking judicial aid to enforce his right to receive service.

Indeed, the recurrent theme of Appellee's argument in his brief with respect to the force and effect of Tariff Regulation 219 and the purported contract for service, discussed herein, is that they effectively foreclose any right of Appellant to challenge in this action the claim that he is directly or indirectly engaged in violation of the law. Apparently Appellee also contends that since it acted under Tariff Regulation 219 and the alleged contract when it terminated Appellee's service, it need no longer consider Appellant as a *bona fide* applicant for interstate Morse wire service. As the tenor of the argument goes, once having lost the service, Appellant has no further recourse in this Court or before any other body against Appellee to compel its restoration, notwithstanding any argument by Appellant that he is engaged in a lawful business. Appellee asserts that Appellant's only recourse is a costly drawn-out litigation before the Federal Communications Commission on an issue the irrelevancy of which is apparent to anyone.

Although Appellee seeks to narrow the instant controversy to the single irrelevant issue of whether or not it acted with impunity in heeding the words of the Public Utilities Commission and law enforcement officers of the

State of California to discontinue Appellant's interstate Morse wire service to the Consolidated Publishing Company, the true issue before the Court is simply whether or not Appellant is entitled to receive interstate Morse wire facilities from Appellee. If Appellant is violating the law and is not entitled to the leased wire service, he has the right to have such issue determined in a duly constituted court of law. As Chief Justice Taft so ably puts it in *Truax v. Corrigan*, 257 U. S. 312, 332, 66 L. Ed. 254, 263:

“The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.”

It is respectfully submitted that Appellant receive the relief as prayed for in Appellant's opening brief.

Respectfully submitted,

CHARLES H. CARR,

Attorney for Appellant.

No. 11,969

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD J. MCBRIDE, doing business as Continental Press
Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corpora-
tion,

Appellee.

PETITION FOR REHEARING.

CHARLES H. CARR,

675 Subway Terminal Building, Los Angeles 13,

Attorney for Appellant.

FILED
DEC 30 1948

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EDWARD J. McBRIDE, doing business as Continental Press
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THE WESTERN UNION TELEGRAPH COMPANY, a corpora-
tion,

Appellee.

PETITION FOR REHEARING.

Comes now the appellant in the above entitled cause and presents his Petition for Rehearing of the above entitled cause and, in support thereof, respectfully shows:

That the opinion of this Honorable Court in this case is at variance with the Transcript of Record and is contrary to law in the following particulars:

I.

The opinion is based upon a misconception of the relief sought and is at variance with the Transcript of Record.

II.

The opinion is in direct conflict with an applicable state decision.

III.

The opinion deprives appellant due process guaranteed to him by the Fifth Amendment to the United States Constitution.

IV.

The opinion abridges appellant's privilege of free speech and freedom of the press guaranteed to him by the First Amendment to the United States Constitution.

I.

The Opinion Is Based Upon a Misconception of the Relief Sought and Is at Variance With the Transcript of Record.

The opinion of this Court discloses its decision is predicated upon a statement of fact clearly erroneous and which is directly contrary to and at variance with the Transcript of Record. The statement is on page 4 of the opinion and is as follows:

“McBride's racing news from the race tracks of other states was sold to a California corporation, Consolidated Publishing Co. of Los Angeles. *Through the latter's direction, the out of state race track news was received through the drops in various places in California.*” (Emphasis supplied.)

Consolidated Publishing Company, hereinafter sometimes referred to as “Consolidated,” is a partnership located in Los Angeles, California, having no connection whatsoever with the various drops referred to in this Court's opinion [R. 13, 14]. Consolidated's only connection of any type or kind whatsoever with the Morse wire of appellant consisted of the one connection, com-

monly referred to by The Western Union Telegraph Company as a drop. This drop was the one through which it received news from appellant [R. 8, 13]. That news was and is used solely in Consolidated's publications, and is not transmitted otherwise to any other person or concern of any kind [R. 15, 16].

The manner in which Consolidated conducts its business is no different than that of its competitor, the National Scratch Sheet, which is presently continuing in business in Los Angeles, California [R. 15].

Consolidated received daily news, including racing news, from appellant's transcontinental Morse wire and uses that news to make up its various publications which are sold throughout the State of California and in the State of Nevada [R. 14]. Consolidated uses no wire service to transmit any news to anyone. Consolidated publishes at least five daily papers, commonly referred to as scratch sheets, which contain mainly racing news although some general news is used [R. 14]. The method of distribution is the same as that of an ordinary daily newspaper. Route men call upon the news dealers throughout the area and deliver the number of scratch sheets requested by the dealers and the following day collect for those sold and allow credit for those remaining unsold [R. 15].

Consolidated Publishing Company is simply a publisher and nothing more. No one has ever indicated by the slightest inference that Consolidated Publishing Company was engaged in any illegal activity of any kind, and the Transcript of Record it at variance with this Court's statement of fact on page 4 of its opinion heretofore referred to. It might as well be contended that Consolidated should have its drop or connection with United Press

terminated, but no effort so far has been made to sever this by any so-called law enforcing officer.

This Court's opinion on page 3 states:

"It is not necessary that there be a guilty participating of the sender of the messages to the drop. *The guilty use of the drop in receiving the messages is enough to show an illegal use of the wires' service.*" (Emphasis supplied.)

The above quoted sentence combined an erroneous statement of fact and an erroneous conclusion of law. The Transcript of Record must necessarily contain facts showing some activity on the part of Consolidated in receiving news which might be in violation of a stated principle of law—in this case 337a of the Penal Code of California (Book-making). Thus, in order for this Court's quoted statement to be true, Consolidated, in the use of its drop, would necessarily have to, in some way, be involved in actual wagering on horse races.

The Transcript of Record in this case, in so far as evidentiary matters are concerned, consists of the pleadings only. There was no trial. Therefore, such facts that were before the Court for consideration were to be found only in the pleadings and supporting affidavits. Appellant's Complaint, and specifically the two affidavits in support of the Order to Show Cause, shows without question that Consolidated was engaged in a legal business—namely, that of selling its publications on newsstands. Nowhere in appellee's Answer or in the affidavit in response to the Order to Show Cause are any facts alleged to show that either appellant or appellee is engaged in any illegal activity, nor was it alleged by way of a conclusion of fact or law or otherwise.

The sole intimation that Consolidated might be doing something illegal comes not by way of anything alleged by appellee or verified by it, but by appellee attaching to its Answer, as an Exhibit, a copy of the opinion of the Public Utilities Commission of the State of California. That opinion, if it were applicable or relevant in the instant case, does not show that Consolidated was violating any law. Furthermore, the Public Utilities Commission did not intend to say or attempt to say that Consolidated was violating any law of the State of California. This statement is substantiated by analysis of the opinion of the Public Utilities Commission which is found beginning on page 57 of the Record.

It must be kept in mind that the opinion of the Public Utilities Commission dealt with two news services—namely, Continental Press Service (appellant in this case), and the Pioneer News Service, not a party herein. Continental Press is located in Chicago and Cleveland while the Pioneer News Service has its headquarters in San Francisco. The Public Utilities Commission opinion sets forth a list of the drops of appellant, Continental Press, and included among those drops is the one of Consolidated Publishing Company [R. 60]. The Public Utilities Commission opinion then sets forth a list of the drops of the Pioneer News [R. 60, 61]. Thereafter the Public Utilities Commission opinion proceeds to talk generally of “wire services” without indicating whether reference is being made to appellant or the Pioneer News or some other, and says:

“apparently, at the other end of these phones, book-makers are listening for the information.” [R. 63.]

Several pages later in the Public Utilities Commission opinion, this statement is found:

“At *some* of these locations, including drops on the previously mentioned wire services, it was found that bookmaking was being carried on.” [R. 65.] (Emphasis supplied.)

And, again several pages later:

“The evidence in this case shows that *some* of the users of these wire services are engaged in bookmaking.” [R. 68.] (Emphasis supplied.)

From the foregoing references to the opinion of the Public Utilities Commission, it is apparent that that opinion did not state or even indicate that Consolidated was engaged in any form of bookmaking or any other illegal activity. As a matter of fact, a reading of the testimony before the Public Utilities Commission and a study of its opinion discloses that the Commission, when speaking of bookmaking, was actually referring to some persons who were several times removed from any particular wire service.

The only other statements in the Transcript of Record respecting alleged violations of law were in the letters of the Attorney General and the Sheriff of Kern County. A cursory reading of the Attorney General's letter will readily disclose that it does not assert that Consolidated was violating any law whatsoever. The opening paragraph of the letter states:

“A survey of the transcript of the proceedings of February 18, 19, 25 and 26, and of March 10, 1948, before the Public Utilities Commission of the State

of California at its hearings pertaining to the illegal use of Western Union wire services and/or telephonic equipment, *indicates* that you had leased wires to the Continental Press Service, which were and are engaged in furnishing information to bookmakers in violation of Section 337a of the Penal Code of the State of California, at the following addresses:" [R. 35.] (Emphasis supplied.)

The letter then lists several addresses among which is included that of Consolidated.

The Attorney General's letter does not say that book-making is carried on at the various addresses listed but that his survey of the transcript of the proceedings of the Public Utilities Commission:

"* * * *indicates that you had leased wires to the Continental Press Service, which were and are engaged in furnishing information to bookmakers*
* * *." (Emphasis supplied.)

Not only does the notice from the Attorney General fail to disclose that Consolidated was violating any law, but it also fails to meet the requirements of Tariff 219(8) in so far as a notice of a violation of law is concerned. The Tariff requires the notice to state that "the service is being supplied contrary to law." This is not done by the Attorney General's letter. The Attorney General merely said that the Public Utilities Commission "*indicates*" that appellant is furnishing news to bookmakers at various addresses, one being that of Consolidated. Thus it is obvious that the Attorney General is not saying that Consolidated is violating the law but merely that the Public Utilities

Commission has indicated such was the case, and, as heretofore pointed out, the Public Utilities Commission opinion does not indicate anything of the sort. If it did, appellee could not rely upon it for the simple reason that Tariff 219(8) provides that the notice shall be from a "federal or state law enforcing" agency, and the Public Utilities Commission is not a federal or state law enforcing agency.

The decision of this Court appears to be predicated upon the premise that the Transcript of Record did show that Consolidated was engaged in bookmaking and thus deprived appellant of selling its news to Consolidated because:

"The guilty use of the drop in receiving the messages is enough to show an illegal use of the wires' service." (P. 3 of the Opinion.)

Had the opinion of the Public Utilities Commission and the letter of the Attorney General actually stated that Consolidated was violating the law of the State of California, it would not have supported the factual premise upon which this Court predicated its opinion. Certainly an opinion of a State Public Utilities Commission cannot be considered evidence, nor can a letter of any law enforcing officer. At most, both are mere matters of opinion, and, in the trial of the case in the lower court, would not have been admissible as evidence. Appellee, by merely annexing these two exhibits to its Answer, certainly could not transform those opinions into factual matter.

It further appears that this Honorable Court misconceived the relief sought by this suit. In the opening paragraph of this Court's opinion, it is stated that:

“* * * McBride seeks to ‘compel the restoration to him’ by the telegraph Company of the *telegraph wire service to transmit race track news between cities in eastern states and California cities.* * * * and that he cannot transmit such news ‘over interstate Morse wire facilities unless Defendant is compelled or required by order of this Court to continue to supply Plaintiff with such facilities’.”

From the foregoing, it would appear that this Court interpreted this suit as an attempt to reinstate either appellant's transcontinental Morse wire or all of the various drops existing in California. Such is not the case at all. The transcontinental Morse wire of appellant, which crosses the United States and comes into California and then reaches into Canada and Mexico, has never at any time been disconnected [R. 3, 18]. It is only the drops in California which have been disconnected from the transcontinental Morse wire. This suit does not concern itself with any of those drops except one—that being Consolidated's. Thus the sole question in this case is whether or not appellant was entitled to have appellee re-establish the drop with Consolidated Publishing Company of Los Angeles.

In paragraph 3 on page 4 of this Court's opinion, reference is made by the Court to a notice of the Attorney General and of the Sheriff to the telegraph company:

“that such illegitimate use of the drops was being made in several cities in California and by the Sheriff of Kern County, California, that such use was being made in the city of Bakersfield, California.”

As heretofore pointed out, the only issue in this case related to the one drop being used by Consolidated in Los Angeles, and it appears that this Court mistakenly associated or connected these drops with the one of Consolidated. Again it is emphasized that the Transcript of Record clearly shows that Consolidated had no connection whatsoever with any drop in Bakersfield or with any other drop in the State of California.

Again this Court's attention is called to the last sentence of paragraph 3 on page 4 of its opinion wherein it was stated:

"We do not agree that the notifying officers are required to supply to the telegraph company the probative facts to be adduced in court in the trial of the cases of violation stated in the notices."

From the above statement, it appears that this Court was under the impression that the Attorney General's office was in the process of preparation for a prosecution of some type. Nothing in the Record or otherwise indicates such to be the fact. The Attorney General was merely sending a notice under circumstances, not revealed in this Record, predicated upon the opinion of the Public Utilities Commission.

In paragraph 4 on page 4 of this Court's opinion, it appears that the contention made by appellant has been misconceived. The opinion states:

"He contends, however, that his second cause of action requires the telegraph company to disregard the notices of the law enforcement officers *because they concern a past wrongdoing* and treat it as beginning *de novo* a litigation for the supplying of the

telegraphic and drop services which the company refuses him.” (Emphasis supplied.)

Appellant’s contention was and is that irrespective of the notice under Tariff 219(8) he was entitled under Section 406 of the Communications Act to a hearing in the District Court to show that actually at the time of the notice and at any time thereafter he or his customer, Consolidated, was not, in fact, violating any law of the Federal or State Governments and was, therefore, entitled to the restoration and return of the wire facilities. This Court’s opinion indicates that the Court thought that appellant’s position was that the suit would not relate to the legality of the service at the time of the notice but would only involve the question of legality after and during the time the suit was on file. Appellant contended and still contends that, after receipt of the notice, he was entitled to proceed to the District Court under Section 406 of the Communications Act and to then and there establish by competent proof that he was entitled to the restoration of the service because at the time the notice was received and thereafter he and his customer, Consolidated, were, in fact, in a legitimate business and neither was violating any law.

The foregoing references to the opinion of this Court clearly show that its decision was based upon two wholly erroneous statements of fact, namely:

(1) That through Consolidated Publishing Company’s direction, the racing news was received through various drops in California; and

(2) That there was a guilty use of the drops by Consolidated in receiving the news.

Both statements are contrary to the Record in this case. Consolidated had nothing whatsoever to do with any drops in California except the one in Los Angeles by which it received news from appellant. Furthermore, Consolidated had no connection with appellant, Continental Press, except as a customer to purchase news. Nor did Consolidated have any connection, proprietary or otherwise, with appellant's other customers or drops [R. 13, 14, 15]. The relationship was simply that of vendor and vendee of news.

In regard to the second erroneous statement of fact, it must be assumed that this Court mistakenly assumed that the Record showed that violations of Section 337a of the Penal Code of California occurred at Consolidated's drop (its place of business) where it received the news. Nothing in the record supports such a conclusion. On the contrary, the Record shows, without question, that Consolidated was and is engaged solely in the dissemination of news through its publications which are sold on newsstands [R. 14, 15]. It transmits no news through wire facilities. Consolidated does not participate in or conduct wagering or bookmaking nor has it any connection or interest in such, either directly or indirectly [R. 15].

Not in all the years that Consolidated has sold its publications to the public has any official or any other person ever even so much as intimated that Consolidated was engaged in bookmaking or wagering of any type. Such is just not the fact and the record so shows. It would, therefore, appear that this Court's decision was predicated upon a misconception of the facts contained in the record.

II.

The Opinion Is in Direct Conflict With an Applicable State Decision.

The decision of this Court in the instant case is contrary to the decision of the District Court of Appeal of the State of California in the case of *People v. Brophy*, 49 Cal. App. 2d 15. Petition for hearing in the Supreme Court denied February 5, 1942.

In particular, this Court has construed Section 337a of the Penal Code of California directly contrary to the construction placed upon it by the District Court of Appeal in the *Brophy* case.

It cannot be doubted that this Court is bound to follow the construction placed upon the statute by the California Court.

Rules of Decision Act (28 U. S. C. A., Sec. 725);
Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188;

Six Companies of California v. Joint Highway District No. 13 of the State of California, 311 U. S. 180, 85 L. Ed. 114.

This Court's decision in the instant case is predicated upon the alleged guilty use of the drop in receiving messages.

"The guilty use of the drops in receiving the messages is enough to show an illegal use of the wires' service." (Op. p. 3.)

This holding is diametrically opposed to the holding in the *Brophy* case. In that case the facts showed that the notice from the Attorney General specifically stated that

Brophy was furnishing information to bookmaking establishments throughout the state by telephone and other wire facilities. Furthermore, the telephone company set up as an affirmative defense that, following the letter from the Attorney General, it had made inquiry of the Attorney General and his deputies as to the nature of the evidence against Brophy; that the Attorney General and his assistants had informed the telephone company that law enforcement officers had been present at bookmaking establishments in the County of Los Angeles and had observed that information, which was used for the purpose and in connection with the placing of wagers upon horse races, was being received at said place over telephone equipment; that the law enforcement officers had checked the source of information and had found that it had emanated from Brophy's place of business from whence it was transmitted to said bookmaking establishments. The District Court of Appeal held, among other things, that:

(1) "Respondent's claim that the furnishing of racing news to bookmaking establishments by telephone constitutes an aiding and abetting in a violation of section 337a of the Penal Code is without merit." (P. 33.)

(2) "Simply because persons who received information transmitted over the telephone facilities were enabled as a result of such information, if they were so inclined, to commit unlawful acts, *does not make the telephone company a violator of the criminal laws.*" (Emphasis supplied.) (P. 33.)

(3) "Furthermore, the furnishing or *receiving of racing or sporting information is not gambling and is not a crime.*" (Emphasis supplied.) (P. 34.)

Plainly, the *Brophy* case holds that the receiving of racing news is not a crime and does not violate section 337a of the Penal Code of California. Furthermore, it must be emphasized that in the *Brophy* case the receiving of the news was by bookmakers, and, despite that fact, the Court held that the receiving of the news was not a crime nor was the use of the wire facilities a crime.

This Court's decision is premised on a contrary principle of law, namely, that the receiving of the news is a violation of section 337a of the Penal Code. This is indicated by this Court's opinion in two places. In the last sentence of Paragraph 2 on page 4, this Court said:

"It is not relevant to the contention here that the restoration of the service was properly denied by the telegraph company because it was advised by California law enforcement officers that the recipients of the news were bookmakers using the receiving drops in making racing bets, *thus causing the telegraph company to supply service violating the California law.*" (Emphasis supplied.)

The foregoing discloses that this Court concluded contrary to the holding in the *Brophy* case that the receiving of the news caused the Western Union to supply service which violated the California law. This holding is contrary to the California court statement on page 33, *People v. Brophy, supra*:

"Simply because persons who received information transmitted over the telephone facilities were enabled as a result of such information, if they were so inclined, to commit unlawful acts, *does not make the telephone company a violator of the criminal laws.*" (Emphasis supplied.)

Thus, if Consolidated were actually engaged in book-making, which the Record discloses it was not, the receiving by it of the news would not be a violation of the California law by Consolidated, the supplier, Western Union or the wire facility.

In the first sentence of the last paragraph on page 3 of this Court's opinion, it was said:

“The important factor in the regulation is that it is the ‘service’ being supplied by the telegraph company over its wires through any drop which it may discontinue on receiving notice that it is violating the law.”

The notice from the Attorney General could not meet the requirements of Tariff 219(8) which requires that the notice advise “that the service is being supplied contrary to law” because, upon all of the facts in this Record, including the opinion of the Public Utilities Commission, those facts were insufficient under the *Brophy* case to constitute a violation of section 337a of the Penal Code or any other California law.

The decision of this Court in this case necessarily required an interpretation of section 337a of the Penal Code of California. It was upon a notice from the Attorney General which stated that violations of 337a were “indicated” by the opinion of the Public Utilities Commission that caused the Western Union to disconnect. No claim was made that any other state law or federal law was being violated. Thus this Court could not close its eyes to the record and merely assume a violation of 337a. To do so would be to ignore the basic concepts upon which our system of jurisprudence is founded. Certainly this Court was required to determine whether or not there was some

basis for the claimed violation, and to do so involved an interpretation and construction of 337a of the California Penal Code. Since the State court had placed its construction upon that law, this Court was bound to follow it.

Any other process of reasoning could lead only to this Court's conclusion that the *Brophy* case was not applicable. If this was the case, and it is not clear from this Court's opinion, this Court has in effect held that a mere notice alone is sufficient to forever deprive appellant of the wire facilities irrespective of whether or not there was any basis for the notice. Such a holding would obliterate the remedies provided by Congress in section 406 of the Communications Act and make the statute a nullity. Congress intended by the Act to give one legally entitled to a wire facility a speedy remedy in the District Courts. A determination by the District Court would require a decision upon evidence of the question of the right to the wire facility both at the time of the notice and thereafter and that, in turn, would require a construction and application of the state law. Certainly a mere notice of a law enforcing agency cannot destroy the remedies provided for by Congress.

It can be readily understood that there are probably many tariffs which give the Western Union the right to disconnect a wire facility under a given situation. In any such case where a discontinuance occurred, the obvious remedy is afforded by section 406 to sue in the District Court for a determination of the right to the wire facility both at the time of the notice and thereafter. Thus, in the instant case, the suit would require an adjudication of not only the legal right to the wire facility from the beginning of the suit, but also whether the notice was

with or without substance. This construction in no way conflicts with the intent and purpose of Tariff 219(8). The Tariff serves to protect the Western Union from the consequences of its act of discontinuance upon receiving notice in the event it should thereafter be determined by the District Court that the subscriber was legally entitled to the wire facility at the time of the notice and thereafter. In other words, the notice serves to permit a discontinuance pending adjudication if one is sought.

The reasoning of the *Brophy* case is analogous to a well-settled principle of law which was the subject of a well considered and scholarly opinion of Judge Learned Hand in the case of *United States v. Falcone* (C. C. A. 2d), 109 F. 2d 579, and which was affirmed by the Supreme Court, 311 U. S. 205, 85 L. Ed. 128. In that case certain jobbers, wholesalers and distributors were indicted as co-conspirators with certain operators of illicit stills. The jobbers, wholesalers and distributors supplied sugar, yeast and cans for use in the illicit distillery. The court held that the seller of goods did not become a conspirator or an abettor by such sale, although with knowledge, and reversed the judgments of conviction. Judge Hand said on page 581 of the opinion:

“It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.”

It is respectfully urged that the *Brophy* case is applicable and that this Court is bound to follow the construction placed upon 337a of the Penal Code by the California Court.

III.

The Opinion Deprives Appellant Due Process Guaranteed to Him by the Fifth Amendment to the United States Constitution.

Appellant respectfully urges that this Court has construed Tariff 219(8) in such a way as to completely deny appellant procedural due process guaranteed to him under the Fifth Amendment to the United States Constitution. Appellant has been deprived of a property right, namely, that of selling his news to a publisher, Consolidated Publishing Company of Los Angeles, upon a mere notice, and an insufficient one at that, without a hearing in any forum on the merits of whether or not the supplying or receiving of such news is in violation of the California law.

The steps which led up to the denial of procedural due process to appellant are as follows:

The Attorney General of the State of California wrote a letter to appellee which purported to indicate that appellant's customer, Consolidated, was violating section 337a of the Penal Code of California. Western Union disconnected the drop by which Consolidated received its news for use in its publications from appellant.

Appellant filed a suit in the United States District Court of Southern California seeking relief under section 406 of the Communications Act and also an additional cause of action for equitable relief. Appellant, in his Complaint, set forth facts to show that both appellant and Consolidated, his customer, were engaged in a legal business. In support of the Order to Show Cause, appellant filed two affidavits, one by Edward J. McBride [R. 17] and the other by Harold V. Belden [R. 13], one of the partners of the firm of Consolidated.

The affidavit of Harold V. Belden described in detail the method of operation by Consolidated as a publisher of newspapers, commonly called "scratch sheets." That affidavit clearly showed that Consolidated was simply engaged in the distribution of publications through regular newsstands throughout the States of California and Nevada.

Appellee filed the affidavit of J. W. Inwood responsive to the Order to Show Cause, and that affidavit made no denial of any of the matters set forth in appellant's Complaint or the two supporting affidavits. It merely referred to the opinion of the Public Utilities Commission and the letter of the Attorney General.

Appellee also filed its Answer and in no place in that Answer was there any denial made of the allegations of appellant respecting the legality of the business of either appellant or Consolidated. As a matter of fact, appellee in its Answer alleged that it was without knowledge and denied on information and belief that appellant was engaged in the business of disseminating information of sporting events or racing news "either over interstate and foreign communications wires and facilities of defendant or otherwise; * * *." [R. 54.]

Furthermore, in its Answer, appellee alleged that it was without knowledge concerning the business of Consolidated and denied upon information and belief that it was engaged in disseminating racing news through publications [R. 49 and 50].

Appellee in its Answer set up the letter from the Attorney General [R. 73-75] and attached a copy of the opinion of the Public Utilities Commission of California as an exhibit thereto [R. 56].

Prior to a trial, the District Court ruled that it had no jurisdiction thus preventing appellant from a trial on the merits of whether or not he was entitled to relief under section 406 of the Communications Act. Thereupon it was necessary for appellant to lodge this appeal in order to establish that the District Court did have the jurisdiction under section 406 to determine whether or not appellant was entitled to the relief sought. This Court, upon this state of the Record, decided that the lower court did have jurisdiction; but, because of the notice of the Attorney General, appellant was forever precluded from any relief irrespective of whether or not he or his customer, Consolidated, may have been engaged in a legal business at the time of the notice and thereafter. Thus this Court has adjudicated that appellant is not legally entitled to transmit his news to Consolidated, his customer, upon a mere statement of a law enforcement officer and has thereby deprived appellant, without a hearing on the merits, of a valuable property right, namely, that of distributing and selling his news to his customer, Consolidated.

In arriving at such a conclusion, this Honorable Court has construed Tariff 219(8) in such a way as to deprive appellant of procedural due process. The construction placed upon the Tariff by this Court is that mere notice from a law enforcing agency alone not only permits the Western Union to discontinue the service but to forever refuse such service because of the notice without appellant's being permitted to show that at the time of the notice and thereafter he was justly and legally entitled to the wire facility under section 406. For example, if it should have developed that the notice from the Attorney General had inadvertently named Consolidated, under

the foregoing interpretation appellant would have no relief afforded him because the notice presupposes illegality. In the last paragraph of this Court's opinion, it is stated:

"The effect of such a construction would make nugatory the provisions of Section 219(8). A new illegal use would follow to be stopped only long enough for the bringing of another such suit as here. The process of law violation would continue indefinitely with only minor stoppages by an impotent Attorney General. The telegraph company may rely on the Attorney General's and the county sheriff's notices as sufficient to justify the telegraph company's refusal to render the services, which, as both complaints describe it, would be a continuing of past services." (Op. p. 5.)

The foregoing remark presupposes illegality without the opportunity on the part of appellant for a determination on the merits of whether or not there was any violation of law by him or his customer. Such an interpretation of the Tariff clearly deprives appellant of due process, and the letter of the Attorney General amounts to an adjudication of his rights and prevents appellant from seeking relief in a court and showing that he is actually entitled to the service.

Appellant has contended from the beginning that any notice under the Tariff that the facility is being used illegally affords a concomitant right to the person using the facilities to apply to the Court for the purpose of showing that he was entitled to the service at the time of the notice and thereafter. There would be no necessity of attacking the Tariff since the Court in which the relief was sought would necessarily have to determine whether,

at the time of the notice and thereafter, the user was legally entitled to the wire facilities.

The Court's interpretation of Tariff 219(8) in the decision in this case also imperils all wire services such as Associated Press, United Press and International News Service. Those companies use leased wires of Western Union and disseminate news to thousands of customers throughout the country including newspapers, radio stations and individuals. Yet, under the decision in this case, a mere notice from the Attorney General of California, in the form of an opinion, would be sufficient to cause the Western Union to terminate such wire facilities. Thereafter the wire service, whichever it might be, would be precluded from seeking relief under Section 406 of the Communications Act because, under the holding of this Court, a notice presupposes and adjudicates illegality and denies the right to seek an adjudication on the merits.

This Court's interpretation of Tariff 219(8) also raises a serious question as to whether or not such interpretation would cause the action of the state law enforcing agency to infringe upon Section 1 of the Fourteenth Amendment of the United States Constitution, which provides:

“* * * nor shall any State deprive any person of life, liberty, or property, without due process of law;
* * *”

As heretofore pointed out, this Court's opinion has placed such a construction upon the Tariff as to make a mere notice from a law enforcing agency alone sufficient not only to terminate the service but to forever withhold it from appellant or anyone without a hearing on the merits of his right to such service at the time of the notice and thereafter. Accordingly, under the interpretation

placed upon Tariff 219(8) by this Court, all that is necessary for the permanent discontinuance of a wire facility is a mere notice from a law enforcing agency irrespective of whether or not such notice is erroneous, arbitrary, capricious, speculative or without any foundation of fact whatsoever. Furthermore, the phrase "law enforcing agency" would appear to include any officer from constable to the Attorney General of the State, for law enforcing agency has commonly been interpreted to mean any person charged with the enforcement of the criminal laws in any capacity. Such a procedure completely obliterates due process in substance and in essence, for it condemns without a hearing.

A business built through the toil of years can be completely wiped out by the mere fiat of a State officer who may be acting in a wholly irresponsible way or without any motive connected with law enforcement. Upon such a premise, a citizen may be deprived of his property rights and his business condemned without an opportunity of a hearing in the Courts which were established to protect his rights to show that at the time of the notice and thereafter he was actually engaged in a business which is not only legal but one which the Constitution and the laws of this country were formulated to protect.

The peril to this appellant is no less than that which, under this decision, will threaten such organizations as the Associated Press, United Press, International News Service, Trans-Radio News and all of the other services supplying news of all types and kinds to newspapers, radio stations, brokers and individuals in every type of business in the United States and throughout the world. For, under this decision, the Attorney General of the State of California may, upon a flimsy notice, cause the Western

Union to terminate its leased wire facilities to any of these organizations and deprive the great news-gathering agencies of their customers without a resort to a final determination upon the merits of whether or not such services were at the time of the notice or thereafter violating any laws of the State of California. If this decision stands, there would appear to be no reason why the Attorney General of the State of California could not give the same type of notice and deprive appellant's customer, Consolidated, of its drop through which it now receives the news from United Press.

Since the return of legalized racing to the State of California, many attempts have been made to stifle national news agencies which disseminate racing news without success. The first attempt was made by Earl Warren, then Attorney General of the State of California, in 1940. At that time an injunction was obtained in the Superior Court of Los Angeles County restraining various and sundry persons from distributing racing news "for the illegal operation of bookmaking establishments" by telegraph, telephone and in other ways. After certain of the persons restrained were adjudicated in contempt of court in violation of the injunction, a writ of habeas corpus was sought in the Supreme Court of California for their release and in two cases that Court held that the injunction was invalid.

See:

Kreling v. The Superior Court of Los Angeles County, 18 Cal. 2d 884;

In re Harry E. Moore on Habeas Corpus, 18 Cal. 2d 889.

Shortly thereafter the District Court of Appeal handed down the *Brophy* decision again clearly sustaining the validity of the dissemination of racing news. In connection with the *Brophy* case, it should be noted that the District Court of Appeal gave careful consideration to the matter of whether the furnishing or receiving of news of this type violated Section 337a of the Penal Code of California, and decided that it did not. Also, the opinion went to great lengths to thwart the effort of the law enforcing agencies to infringe upon the free dissemination of news.

It is common knowledge that over all these years during the time which these abortive efforts have been made to stop the dissemination of racing news, not one prosecution has ever been instituted by any of the law enforcing agencies upon the theory that the furnishing or receiving of racing news is a violation of Section 337a of the Penal Code of California. In this connection, this Court's attention is called to the fact that the *amicus curiae* brief of the Public Utilities Commission of the State of California did not even contend that the furnishing or receiving of racing news is illegal. The whole tenor and theory of that brief was that there should be a "changed application of the rules." (*Amicus Curiae* Brief, p. 10.)

It may well be that some of the careless statements of the brief of *amicus curiae*, which were wholly at variance with the record, misled this Court and for that reason, and that reason only, reference is made to that brief. In the first place, it needs no citation of law for the proposition that the Public Utilities Commission is not a law enforcing agency and that, if the State of California had appeared in this matter by the one duly constituted by

law, it would have been the Attorney General and not the Public Utilities Commission.

Analysis of the *amicus curiae* brief discloses that, at best, it is a resort to adjectives and is a condemnation generally of the so-called bookmaking racket. At no place does that brief state that the furnishing or receiving of racing news is illegal but, on the contrary, its equivocating and vacillating reasoning calls upon this Court:

“The law must be realistic and keep abreast of this race to pervert progress in invention to the fell purpose of organized crime. The public interest demands that the law, on its part, be as resourceful and progressive and—if you please—as realistic as are the cynical leaders of the criminal syndicates.” (A. C. Br. p. 9.)

Again it is repeated that the *amicus curiae* brief does not with frankness and directness claim that the furnishing or receiving of racing news is a crime, but, on the contrary, says:

“We do not take the position that the rules of law should be tortured into special application to meet this threat of organized crime without and beyond the accepted standards of due process and equal protection of the law. We do contend, however, that, while rules and principles of law do not change, the facts and circumstances of a situation may call for *a changed application of the rules*. Power of government does not change but special circumstances may call forth and give rise to legitimate application of a power of government that in different circumstances lawfully could not have been applied.” (Emphasis supplied.) (A. C. Br. p. 10.)

If it was seriously contended by the Public Utilities Commission that the furnishing or receiving of racing news is a crime, then why all the equivocation as set forth above? At least somewhere in the brief of the Public Utilities Commission or in its opinion it should have directly stated or taken the position that the furnishing or receiving of racing news is a crime. There can be little doubt that, had the Public Utilities Commission and its counsel sincerely believed that the furnishing or receiving of racing news was a violation of Section 337a of the Penal Code of California, its opinion or its brief would have so stated.

It is respectfully urged that the interpretation placed upon Tariff 219(8) by this Court would make such Tariff invalid and contrary to law on its face whereas an appropriate and reasonable interpretation may sustain the validity of the Tariff and at the same time preserve the rights of appellant. The obvious intent and purpose of Tariff 219(8) was to permit the Western Union to discontinue its wire facilities to appellant or any other customer if one of two things occurred: (1) If the facility was being used to violate the law, either directly or indirectly, or (2) upon notice from a law enforcing agency that "the service is being provided contrary to law." Of course, the first proposition presupposes actual proof of a violation whereas the second serves to protect the Western Union for a disconnection until there can be an adjudication if one is sought by the aggrieved customer of Western Union.

It should be kept in mind that a Tariff such as 219(8) is actually prepared by the Western Union and filed with the Federal Communications Commission, and, if no objection is raised, becomes effective after a statutory period has elapsed. It is obvious that the Western Union, in preparing and filing the tariff, was doing so to protect itself and it certainly did not contemplate that a mere notice would preclude an ultimate hearing and adjudication upon the merits as to whether or not there was a violation of law.

The only reasonable interpretation, which is in accord with due process, is that after the notice has been given the aggrieved party, he has the right to proceed to court under Section 406 of the Federal Communications Act and have adjudicated whether or not he was violating the law and whether he was legally entitled to the service at the time of the notice and thereafter. A construction which deprives appellant of such a hearing and adjudication certainly denies him the due process guaranteed to him under the Constitution.

The last paragraph of this Court's opinion indicates that this Court misconceived the nature of the suit under Section 406 of the Communications Act. It appears that this Court thought that the suit would not relate to the legality of the service at the time of the notice, but would only involve the question of legality after and during the time the suit was on file. Thus, under the Court's interpretation, the so-called illegal act having passed, the service would be restored, a new notice would follow and in

turn a new suit. This, it is submitted, was not the theory of appellant's suit or his argument, but, on the contrary, his contention was that, once a notice having been received by the Western Union, he was then entitled to his day in court to show that actually at the time of the notice or at any time thereafter he or his customer, Consolidated, was not in fact violating any law of the Federal or State Governments and was, therefore, entitled to the restoration and return of the wire facilities. Such an interpretation would accord due process whereas the Court's interpretation would deny it.

The above construction contended for by appellant is consistent with procedural due process and would not render nugatory, as this Court thought, the provisions of Tariff 219(8). It also is in keeping with our established concept of due process as was so clearly stated by Chief Justice Taft in *Truax v. Corrigan*, 257 U. S. 312, 332, 66 L. Ed. 254, 263:

"The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

IV.

The Opinion Abridges Appellant's Privilege of Free Speech and Freedom of the Press Guaranteed to Him by the First Amendment to the United States Constitution.

The construction placed upon Tariff 219(8) by this Court deprives appellant of his privilege to free speech and freedom of the press guaranteed by the First Amendment to the United States Constitution, and also raises a serious question as to whether the interpretation does not infringe upon the guarantees of the Fourteenth Amendment inhibiting states from restricting the aforementioned privileges guaranteed by the First Amendment.

It is respectfully urged that the interpretation of the Tariff by this Court actually results in complete censorship and throws open the gates wide for the policeman on the beat to set himself up as an arbiter as to what news shall be disseminated or received. Freedom of speech and freedom of the press will be restricted to those news services which are fortunate enough not to receive a notice from a law enforcing agency, for, under this Court's interpretation, a notice alone suffices to terminate the wire facility and conclude further inquiry into the privilege and right of the dissemination of the news. The power of censorship rests in the hands of the law enforcing agency thus causing a previous restraint upon free speech and freedom of the press.

There can be no doubt that the record in this case clearly shows that appellant's customer, Consolidated Publishing

Company, is engaged in the business of disseminating news through publications, and Consolidated, as well as its supplier, is protected under the First Amendment against abridgment of freedom of speech or of the press. As was said in the case of *Lovell v. City of Griffin*, 303 U. S. 444, 82 L. Ed. 949, 954:

“The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated.”

It might be argued with force that, assuming that the record did show there had actually been a violation of law at the drop where Consolidated received its news, any effort to prohibit the dissemination of news to Consolidated thereafter would in effect be a previous restraint upon freedom of speech and freedom of the press, and, therefore, contrary to the First and Fourteenth Amendments. The preliminary freedom of speech and of the press does not depend upon proof or adjudication that the exercise thereof is legal or illegal. In other words, neither can be restrained despite the fact that they may violate some law. If such exercise of the two freedoms infringe upon any civil right or violate any law, the remedy therefor is a suit for relief or prosecution by the duly constituted authority.

In *Near v. State of Minnesota Ex. Rel. Olson*, 283 U. S. 697, 75 L. Ed. 1357, the Supreme Court had before it a statute of the State of Minnesota which prohibited the publication of "a malicious, scandalous, and defamatory newspaper, magazine, or other periodical." The statute further provided that such publication would be a public nuisance and might be restricted by action of the County Attorney or the Attorney General. The Court held the statute invalid and throughout the opinion, which was written by Chief Justice Hughes, it was reiterated that there could be no previous restraint upon free speech or freedom of the press irrespective of whether the matter was libelous or violated some law. The Court further pointed out that the preliminary freedom against previous restraint must remain untrammelled despite the fact that every occurrence might be a violation of someone's civil rights or of some criminal law. Furthermore, that the remedy for such was not in the previous restraint which was illegal, but in a suit for civil redress or by way of prosecution if the offense should be in violation of any criminal statute.

Again it is urged that this Court's decision interprets Tariff 219(8) in such a way as to impose a restriction upon the freedom of dissemination of news, which is free speech, and consequently restriction upon the freedom of the press of Consolidated, appellant's customer.

It is common knowledge that certain radio stations throughout the State of California and the United States broadcast the news concerning races, including the results thereof and the prices paid on the winning horses. It certainly would not be contended that the radio stations might be deprived of their privilege of disseminating such

news because it was received at the place where the book-making was carried on and actually aided in the consumption of the wagers.

Conclusion.

It is respectfully submitted that the decision of this Honorable Court is erroneous in the several particulars heretofore set forth, to the detriment and prejudice of the appellant in this case, and that appellant is justly entitled to a reconsideration and to a rehearing in order that he may fully and completely present the errors complained of, and that upon further consideration the judgment of this Court may be modified and the relief granted to appellant to which he is entitled.

Respectfully submitted,

CHARLES H. CARR,

Attorney for Appellant.

Certificate of Counsel.

I, counsel for the above named appellant, do hereby certify that the foregoing Petition for Rehearing of this cause, in my opinion, is well founded, fully justified and that it is not interposed for delay.

CHARLES H. CARR,

Attorney for Appellant.

No. 11,969.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

EDWARD J. MCBRIDE, doing business as Continental Press
Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a cor-
poration,

Appellee.

Amicus Curiae Brief on Behalf of the Consolidated
Publishing Company in Support of Appellant's
Petition for Rehearing.

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Appellee.

Amicus Curiae Brief on Behalf of the Consolidated
Publishing Company in Support of Appellant's
Petition for Rehearing.

Leave of the Court having been first sought and ob-
tained, the Consolidated Publishing Company files its brief
as *amicus curiae*.

Statutes Involved.

Federal Communications Tariff 219(8) :

“Facilities furnished under this tariff shall not be
used for any purpose or in any manner directly or in-
directly in violation of any federal law or the laws of
any of the states through which the circuits pass or
the equipment is located, and the telegraph company
reserves the right to discontinue the service to any drop

or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law."

47 U. S. C. A. Sec. 202(a):

"It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

47 U. S. C. Sec. 406:

"The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ."

Penal Code of California, Sec. 337a:

"1. Who engages in pool-selling or book-making, with or without writing, at any time or place; or

“2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

“3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

“4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or

purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

“5. Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, inclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivisions 1, 2, 3 or 4, of this Section; or

“6. Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus,

“Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

“This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive.”

United States Constitution, Amendments, Article I:

“Congress shall make no law * * * abridging the freedom of speech or of the press; * * *”

United States Constituion, Amendments, Article V:

“No person shall * * * be deprived of life, liberty, or property, without due process of law. . . .”

I.

This Amicus Curiae in This Brief Seeks to Protect Its Own Substantial Rights of Liberty and Property, and at the Same Time the Rights of Numerous Other Concerns Covered by the Tariff and Potentially Gravely Affected by the Decision of This Court.

The interest of this *amicus curiae*, Consolidated Publishing Company, in the outcome of this case is two-fold in character. In one aspect, it is based upon serious concern for its own substantial rights; in another, upon concern for the rights of other press, publishing and other concerns subject to Federal Communications Commission Tariff 219(8) or similar rules whose rights to liberty and property are deemed to be potentially endangered by the decision reached by this court in its opinion of December 1, 1948.

Considering the first aspect, Consolidated Publishing Company sought leave of this court to file this brief because its interest in the outcome of the instant case is one involving substantial rights of property and liberty. As is shown by the record, Consolidated Publishing Company operates a publishing concern of considerable dimension, owning printing presses and other equipment of the value of approximately \$100,000. At its plant at 615 North La Brea Avenue, Los Angeles, California, are employed approximately sixty-five workers.

As the record shows, the Consolidated Publishing Company was until April 2, 1948, a customer of the appellant Continental Press Service, receiving from appellant

through wire facilities of appellee Western Union Telegraph Company news and information used by Consolidated Publishing Company for dissemination to the purchasers of the racing publications published by it.

On the above mentioned date, appellee Western Union Telegraph Company shut off the service between appellant and the Consolidated Publishing Company, upon the sole supposed justification that the action was being taken in accordance with Federal Communications Commission Tariff 219(8) and a notice from the Attorney General of California. Appellee has disavowed any belief or proof by it that appellant or Consolidated Publishing Company are in fact guilty of any wrong-doing.

Following this action by the utility, the instant suit was brought by appellant against appellee Western Union Telegraph Company to compel restoration of service. The Consolidated Publishing Company is not now, nor was it originally, a party to this action. However, at the time of the bringing of the action it was believed that in the course of the trial upon the merits the unfolding of the evidence would naturally lead to the presentation of evidence by Consolidated Publishing Company. Thus it would normally have been given an adequate opportunity to present its position and establish, for its part, that it had committed no wrong, and was entitled to the opportunity to continue purchasing of appellant the vital service upon which it depends for information used in its publishing business. Since it was the appellant, and not Consolidated Publishing Company, which is the direct

customer of appellee, the suit was brought by appellant as such customer.

As the case has developed, no trial has ever been had of the issues of fact which appellant has sought to have adjudicated. Under the decision of this court of December 1, 1948, it would appear that no trial of the merits of substantial claimed defenses may ever be had, nor the action of the appellee in discontinuing service ever be challenged in any way in any forum.

Therefore, to protect its substantial rights of property and liberty, and to attempt to assure that a judicial hearing will be held on the merits of the question of the right of appellant to employ facilities of appellee, and of Consolidated Publishing Company to have the opportunity to purchase appellant's information service, Consolidated Publishing Company has sought and been granted leave to file this brief presenting discussion bearing upon issues necessarily involved in this court's final determination of this case.

Turning to the second aspect of the interest of the *amicus curiae* in this case, Consolidated Publishing Company believes that the court's opinion of December 1, 1948, raises important questions of Constitutional law, of grave concern not only to itself but also to all the many concerns receiving service under Federal Communications Commission's Tariff 219(8) and others of similar import.

Under an interpretation earnestly deemed correct by this *amicus curiae*, this tariff would not be challenged.

However, under the view taken thus far by this court it is believed that its interpretation raises the following constitutional questions of general concern:

(1) Does not this court's interpretation of Federal Communications Commission's Tariff 219(8) deny due process of law by denying to everyone of the many tariff-subject concerns the right ever to be heard in any forum on the actual facts regarding a deprivation of liberty and property which may be based solely upon the unsupported notice and opinion of any federal or state law enforcement agency?

(2) Does not this court's opinion of December 11, 1948, misconstrue and hence fail to apply the holding of a California decision required to be followed by this court under the Federal Constitution, Federal decisions, and the Rules of Decision Act?

(3) Does not this court's interpretation of this tariff purport to give appellee, in combination with any law enforcement agency, such right, without review, arbitrarily to license and censor the dissemination of information by a form of prior restraint, as is in violation of the guarantee of the right of freedom of the press and of speech contained in the First Amendment to the Federal Constitution?

To protect the rights of other tariff-subjected publishing and other concerns, as well as its own rights, and to attempt to have this court establish what is deemed to be a correct rule and interpretation on these important questions for the future, the Consolidated Publishing Company herewith presents the following discussion for the use of the court in making its determination whether Appellant's Petition for Rehearing should not be granted.

II.

This Court's Interpretation of Federal Communications Tariff 219(8) Would Render It Invalid as Forbidding a Hearing Upon the Merits, and so Denying Due Process of Law, to Leased Wire Service Users, Who, Charged Only by a Law Enforcement Agency's Unsupported Notice With Violation of Law Are, as a Result, Forever and Without Review Deprived of Their Vital Service.

A. Such Tariffs Are Designed to Fulfill a Plainly Limited Purpose.

What is sought by appellant in this case directly, and by Consolidated Publishing Company indirectly, is simply the opportunity to establish by fair trial in open court that the service between appellant and Consolidated Publishing Company has at no time been supplied contrary to law, and has at all times been used by appellant and Consolidated Publishing Company in a proper and legal way in the conduct of their respective businesses.

The effort of appellee has been, in effect, to establish the extraordinary principle that the law precludes and forbids the possibility of such trial upon the merits, quite regardless of the truth of appellant's stoutly maintained contention that the facility was being legally and properly supplied at the time of the receipt of notice of claimed illegality.

Appellee does not and has not, by way of answer or in its affidavit, made any charge or allegation of wrong doing by either appellant or the Consolidated Publishing Company. Rather, its position has been confined to the argument that the tariff in question permits it irrevocably, upon receipt of notice from any law enforcement agency

that the service is being supplied contrary to law, forever to bar service to those so complained against. The tariff is said entirely to abrogate the power of a court of law to decide upon hearing whether the service was in fact being supplied contrary to law.

Therefore, many of the issues of this case resolve themselves into an interpretation of the applicable Federal Communications Tariff 219(8), having the force and effect of law.

It is respectfully but earnestly submitted that the interpretation made by this court of the tariff is one which upon examination proves to be strained, inaccurate, and unreasonable.

It will be borne in mind throughout the ensuing discussion that appellant and this *amicus curiae* are not seeking in this proceeding to attack the validity of the tariff. What is in issue here is merely a determination of what that tariff means, and how it ought to be construed.

We will now consider the circumstances under which such tariffs are written and the purposes which they are designed to achieve.

Public utilities have a general obligation imposed by law to serve customers on an impartial basis. And in particular it is provided by the Communications Act, 47 U. S. C. A. 202(a) that common carriers engaged in interstate communication by wire or radio must furnish such service to anyone who makes a reasonable request for it. This section of the Act also makes it unlawful for any common carrier to make "any unjust or unreasonable discrimination in . . . facilities, or services in or in connection with like communication service, directly or indirectly by any means or device. . . ."

When a public utility is notified by a law enforcement officer that its supplying of service is in violation of law, it has during the period prior to adjudication no certain way of determining the truth of such notice.

As is said of such a situation in the brief of the California Public Utilities Commission *amicus curiae*, at page 28:

“Appellee’s position is a delicate one. On the one hand, it must be vigilant to see that the furnishing of service by it does not result in aiding or abetting unlawful conduct and, on the other hand, it must be careful not to take action that might subject itself to a charge of discrimination in the furnishing of service.”

Appellee utility thus, like other utilities, is therefore desirous of protecting itself during the period which follows receipt of notice of illegal supply of service and which precedes the adjudication on the merits that a customer believing himself wronged may proceed to secure under the express terms of the Federal Communications Act.

The protective step that is often sought to be taken is the passage of a law, or of some rule or regulation having the force of law, which provides that the utility shall have the right, on receipt of a warning notice from a law enforcement agency that service is being supplied to a customer contrary to law, of discontinuing service to such customer. Thus, as to the uncertain period necessarily preceding an adjudication of the merits, protection is sought by the utility.

Of a like tariff rule it was said in the case of *Partnoy v. Southwestern Bell Telephone Company*, 70 P. U. R. (N. S.) 134 (Reprinted as Appendix A in the *Amicus Curiae* Brief of the California Public Utilities Commission).

“Said rule operates to relieve the regulated Company from being placed in the dilemma of choosing either the course of continuing service under threat of criminal prosecution as an accessory, if the appellant is actually guilty of a crime, or discontinuing service under the threat of civil liability in the event the accusations are wrongly made by the enforcement officers.” (Page xvii.)

Thus such rules are designed in certain situations to serve as a temporary shield for the utility pending adjudication. But they may not be construed as denying the adjudication which alone can properly determine whether a customer is entitled to the restoration of facilities.

For public utilities have as their primary duty the provision of service, on a non-discriminatory basis, to those who seek it. They are not the final measures of their own rights and duties.

Such questions are determined not by the utility itself, but, upon the seeking of review by a customer, by judicial or quasi-judicial hearing to settle the merits of the controversy.

But, it is contended by appellee, though normally the refusal or discontinuance of service by a utility is subject to court review, that general rule is without application here. Why is this thought to be so? Solely because of the existence of a tariff, whereunder the right is given to the utility to discontinue service upon notice of a law

enforcement agency that the service is being supplied contrary to law.

This position is believed to be a legally erroneous and a constitutionally impermissible one. It will be the purpose of the following discussion to attempt to demonstrate why this is so, and to point out the pressing reasons why the tariff ought not to be given broad implied meaning (that of preventing judicial review) far beyond its narrower and obvious one, which has already been discussed.

B. The Right Not to Be Discriminated Against in the Opportunity of Access to Leased Utility Facilities for Use in a Publishing Business Is a Right of Liberty and Property Protected by the Due Process of Law Guarantees of the Federal Constitution.

What kind of right is it that this suit was brought to establish? It is the right of appellant to furnish information through its transcontinental wire, leased from appellee, to the Consolidated Publishing Company, and the right of the Consolidated Publishing Company to have the opportunity to purchase such information, to be used in its business of publishing periodicals supplying racing and other information.

Inability of Consolidated Publishing Company to secure such information would of course have a severely unfavorable effect upon its ability to carry on its publishing business.

Is the right of Consolidated Publishing Company and other publishers to carry on their business such a right of property or liberty as is protected by the due process of law provisions of the Federal Constitution?

Preliminarily it may be noted, and will hardly be disputed, that insofar as they apply to this particular problem, the scope of the due process clauses of the Fifth and Fourteenth Amendments are equivalent. As is said in *Heiner v. Donner*, 285 U. S. 312, at page 326:

“The restraint placed imposed upon legislation by the due process clauses of the two amendments is the same.”

And see:

Hibben v. Smith, 191 U. S. 310, 325;

Coolidge v. Long, 282 U. S. 582, 596.

It has long and clearly been recognized by the Supreme Court that the right to engage in business is a right protected by the due process clause. Thus, in *Meyer v. Nebraska*, 262 U. S. 390, where there was involved the right of a teacher to teach a foreign language in a school, the court stated that there was included among the liberties guaranteed by the Fourteenth Amendment, “the right of the individual . . . to engage in any of the common occupations of life . . .” (p. 399).

In the case of *New State Ice Co. v. Liebmann*, 285 U. S. 262, the court held to be protected by the Fourteenth Amendment the right to enter the business of making ice. Said the court at page 278: “. . . a regulation which has the effect of denying *or unreasonably curtailing* the common right to engage in a lawful private business” (emphasis supplied) violates the Amendment.

A state statute restricting corporate acquisition of drug stores to corporations owned entirely by licensed pharmacists was held invalid in *Liggett Co. v. Baldridge*, 278 U. S. 105, the court saying at page 111:

“ . . . appellant’s business is a property right [citations], and as such is entitled to protection against state legislation in contravention of the Federal Constitution.”

It is quite clear from the principles enunciated in the three cases last referred to, and in many other cases, that the Consolidated Publishing Company and other publishers are engaged in businesses protected by the guarantees of the due process of law provisions of the Constitution. From the basic proposition that the business itself is a protected property right, there follows the aiding corollary that the incidents and operation of the business may not be regulated in an unreasonable or unduly restrictive way. Thus, in the case of *Burns Baking Co. v. Bryan*, 264 U. S. 504, the Supreme Court held invalid a Nebraska statute requiring bread to be baked only in certain sizes (to prevent palming off of smaller for slightly larger sizes). Such regulation was held to be one not reasonably necessary to protect purchasers against fraud. Even though the purpose was a good one, the means chosen were improper, and unduly difficult to comply with. Said the court at page 513:

“ . . . a state may not, under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.”

In the present case, the effect of the court’s decision that appellee need never answer for its shutting off of

service though it would not in terms deny the right of Consolidated Publishing Company to continue in the publishing business, nor of appellant to continue in its business of dissemination of information, would so unreasonably curtail and restrict those rights as to fall within the constitutional prohibition.

Consolidated Publishing Company, appellant, and others engaged in publishing or disseminating information are engaged in businesses protected by the due process clause. These businesses then, may not be taken away from them, nor their operation restricted save in compliance with the requirements of due process of law.

C. The Tariff, as Construed, Unreasonably Denies to Appellant and All Others Subject to the Tariff That Hearing Upon the Merits Which Due Process of Law Demands.

It is clear that under this court's interpretation of the tariff there is in no way provided, for the protection of the substantial rights of liberty and property in operation of their businesses by tariff-covered concerns, that procedural due process of law which is guaranteed by the Constitution.

A full definition of the majestic concept of due process of law is of course impossible to render, and is besides quite unnecessary for the determination of individual cases. Whatever else that concept may include, certainly it must encompass the concept of hearing by a tribunal prior to any judgment depriving persons of life, liberty or property. "Fundamental . . . in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial." (Justice Cardozo, speaking for the Supreme Court in *Palko v. Connecticut*, 302 U. S. 319, 327.)

Or, as the principle is stated in an earlier case:

“ . . . there are certain immutable principles of justice which inhere in the very idea of government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense.” (*Holden v. Hardy*, 169 U. S. 366, 389-90.)

Down through all the years this basic minimal requirement of due process remains undiminished. Thus in the modern case of *Anderson National Bank v. Lockett*, 321 U. S. 233, there was challenged a deposit escheat system under which the state after a time took over inactive accounts and was substituted for the bank as the debtor. It was contended that a person making claim to payment and being refused by the state officer would not be accorded due process of law in determination of the question of his right to payment. The standard applied by the court was this:

“The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.” (Page 246.)

Examining the procedure under the statute, the court held that due process requirements were met because:

“ . . . there is *full opportunity to the depositors to be heard* by the State Commissioner, whose decision is subject to court review.” (Page 246.) (Emphasis supplied.)

And see:

Rees v. City of Watertown, 19 Wall. 107.

As has been pointed out, the effort of Consolidated Publishing Company in this brief, and of appellant throughout the case, has been and is precisely the securing of an opportunity to be heard and to defend their substantive right. (*Cf. Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U. S. 673, 678.) The opinion of this court rendered December 1, 1948, holds that a tariff prepared by appellee, as construed, effectively denies the appellant such an opportunity, and that it must rest content with this sudden and drastic loss of its right to service.

The difficulty in the opinion of the court is not at all that it metes out treatment unduly harsh to the guilty. Rather, it is that under the decision there may be meted out to the guilty and the innocent alike, indiscriminately and without trial, treatment appropriately rendered to the guilty alone, after the fact of their guilt has been established by the decision of a judicial tribunal upon full hearing.

As was well said in the case of *Rees v. City of Watertown*, 19 Wall. 107:

“ . . . whether in fact the individual has a defense . . . or is without defense, is not important. To assume that he has none, and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest.” (Page 122.)

D. In the Light of the Basic Principles Above Discussed, Clearly the Requirement of Notice by a Law Enforcement Agency Would Be an Improper and Inadequate Substitute for the Full and Reviewable Hearing Requirements of the Due Process Clause.

(The making of the following partial catalog of errors into which law enforcement agencies might fall, when sending a notice to a utility that it is supplying service

contrary to law, implies no innuendo against any actual law enforcement agency. It is simply designed to illustrate the error and constitutional impropriety of permitting non-judicial agencies, regardless of their capabilities within their own proper spheres of activity, to serve, in effect, as final arbiters of law and fact concerning such important matters involving rights of liberty and property as are here involved).

The notice provided by the tariff can in no way serve as a proper substitute for the full and fair hearing which a customer demanding the right to utility service would otherwise be entitled to before a judicial or quasi-judicial tribunal charged with determining the merits of the controversy.

To begin with, as a matter of interpretation it may be said that it would be indeed a startling and dubious delegation and abdication of power under which federal legislation would provide as to a matter of federal right that the usual full and factual hearing by a specific tribunal, followed by review, should be replaced by a bare notice, basable on incomplete or entirely absent hearing, quite unreviewable, and rendered by any one of a myriad of law enforcement officers of any of many different jurisdictions.

Under our law the police and prosecution agencies are traditionally not the final adjusters of the law, but only the enforcers of it. They do not have facilities for the holding of full hearings upon questions of fact and law. Nor indeed is that their function. Rather, their efforts are directed primarily to the routine enforcement of the law, and to the apprehension of suspected criminals and their prosecution.

Yet under this court's interpretation of Federal Communications Tariff 219(8) the adjudication of such persons would be the only one required to deprive tariff-subject customers of vital rights guaranteed by the Federal Constitution. Indeed, not only would such officers make the adjudications; but their adjudications would be unreviewable, whether or not based on a proper hearing or an improper one, or on none at all.

It would not matter that an error of fact might have been made—even one so gross as a complete error of identity.

It would not matter that the law enforcing agency might have been guided by passion or prejudice.

It would not matter that the law enforcement agent—perhaps a person of very moderate legal sophistication—might, in notifying of a violation of law, have committed an error of law.

None of these things would matter at all. The notice would still be the end of the proceeding—the complete and perfect basis for a utility company's action (the depriving a customer of service) normally reviewable, but now, strangely, grown sacrosanct, judicially unassailable.

It is respectfully submitted that the unreasonableness of such a holding is a most powerful argument in behalf of another interpretation limiting the tariff to a narrower meaning, and, consonant with relevant laws and with decisions of an analogous kind, next to be discussed, permitting factual determination of the issue whether service ought to be restored or not.

E. The Lack of a Hearing Before the Discontinuance of Service in No Way Implies a Lack of Right to a Hearing After Such Discontinuance.

It is true that situations sometimes arise wherein a compelling public or private interest permissibly requires the taking of action prior to the granting of a hearing to those affected.

But, merely because a hearing cannot be granted first, it may not be assumed that in such situations no hearing shall be granted at all. Indeed, the urgent need for a full and fair hearing in such situations is apparent, in order that those acted against shall suffer as little as possible as a result of the extraordinary pre-hearing action which only the unusual exigencies of the situation have justified.

As one of many examples of hearings following upon rather than preceding the taking of action, we may consider the case of *United States v. Illinois Central Ry. Co.*, 291 U. S. 457. Here there was challenged a provision of the Inland Waterways Corporations Act empowering the Interstate Commerce Commission acting *ex parte* to order all connecting common carriers to join with water carriers in through routes, joint rates, and other matters.

The court gave full and serious consideration to the contention that the *ex parte* character of the order rendered the statute violative of due process. The court's opinion adverted at length to a commission opinion wherein a commissioner construed the statute as requiring that, if an interested carrier made protest,

"It would then be our duty to hear said complaint and decide said matter before said rates become effective . . . in the event such a hearing is not had and the matter disposed of before the effective date

of such rates, it would be our further duty temporarily to suspend them until said matter is decided. . . .”
(Page 461.)

The commissioner declared that this procedure would be necessary to comply with the requirements of due process of law.

Upon this basis, the court upheld the constitutionality of this statute against the due process attack. The court’s opinion said (p. 461): “This is an admissible construction of the statutory proceedings.”

Thus, by construction of the statute to require, after the *ex parte* setting of the rate, a full and fair hearing upon request of interested parties, the Interstate Commerce Commission and the Supreme Court upheld the statute against a due process attack that would otherwise have been irresistible.

Cf. Yakus v. United States, 321 U. S. 414, 436-7.

Again, in the case of *Fahey v. Mallonee*, 332 U. S. 245, the court considered the question of the constitutionality of a statute whereunder hearings regarding the appointment of conservators for improperly managed or failing federal reserve savings and loan associations were held after rather than before the appointing of such conservators. Said the court, speaking through Mr. Justice Jackson, “This is a drastic procedure.” But it concluded, because of “the delicate nature of the institution and the impossibility of preserving credit during an investigation,” and “in the light of the history and customs of banking,” which the court called one of the longest regulated and most closely supervised of public callings, “we cannot say it is unconstitutional.” The court cautioned, however, that

the use of supervisory authority in such manner (*i. e.*, prior to hearing, even though closely followed by full hearing) was “a heavy responsibility to be exercised with disinterestedness and restraint.” (Page 253.)

Compare the interesting case of *Edison Co. v. N. L. R. B.*, 305 U. S. 197, wherein, when it was urged by the board that “due process does not require an opportunity to be heard before judgment, if defenses may be presented upon appeal,” it was answered by the Supreme Court that “this rule assumes that the appellate review does afford opportunity to present all available defenses.” (Page 234.)

Another and somewhat striking example of the principle that prior action, though required and permissible, does not foreclose future factual and legal review, is to be found in an extremely broad and familiar area of the law.

This is the field of eminent domain. Here the sovereign or those authorized under it (including incidentally such public utilities as appellee itself) in certain cases may take immediate possession of property sought to be condemned, upon the commencement of condemnation proceedings. It would hardly be contended by anyone that simply because such preliminary taking is permissible, a judicial hearing thereafter consequently ceases to be required. The right to such a taking in advance exists, without question; but it by no means forecloses the final answers to legal and factual issues as to the right of the sovereign or its instrument to condemn the property involved. Laying quite aside all problems of valuation, the owner of property sought to be condemned is entitled to a full judicial hearing on such matters as whether the use for which the property is sought is a public one and whether, if the use be public, the property involved is reasonably necessary for such use.

The condemnation proceeding may, and not infrequently does, end with an originally dispossessed owner, successful upon judicial hearing, restored to the possession of his property. So in the instant case also, regardless of any temporary right of the utility to discontinue service between appellant and Consolidated Publishing Company, the appellant unquestionably ought to have the right to a hearing wherein there will be determined the dispute whether the service ought properly to be restored or no.

In the present case as in situations discussed above, provision for a full and fair hearing after the taking of action against appellant is not only a permissible but a constitutionally required interpretation of the tariff.

F. The Principle of Full Hearing Upon the Merits, in Cases of Discontinuance of Supplying of Facilities Upon Receipt of Notice of Wrongdoing, Has Been Vigorously Affirmed and Applied in Important Cases Urged in Behalf of the Position of Appellee.

Though appellee and the *amicus curiae* brief of the California Public Utilities Commission have sought to convince this court that a trial upon the merits is neither necessary nor required, several of the cases most urgently cited by them support an exactly opposite viewpoint.

A prominent example of this is to be found in the case of *Howard Sports Daily v. Weller*, 179 Md. 355, 18 Atl. 2d 210, much relied upon by appellee. Under the tariff there involved, the special contract service was cancellable upon a minimum of one day's notice by either party. The telegraph notice received a notice from the United States Attorney that the service was being supplied to a customer contrary to law. It thereupon promptly terminated service.

The utility customer was held not to be bound in any way by this notice and termination. Rather, under Maryland procedure, the utility customer was then given a full trial before the Maryland Public Service Commission, which found upon evidence presented to it that there had been proper cause for the shutting off of service.

The upper court, upholding the judgment against the customer on this basis, pointedly quoted the great statement from *Truax v. Corrigan*, 257 U. S. 312, still good law upon this point:

“The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protections of the general rules which govern society.”
(Page 332.)

In the Howard case the customer, right or wrong, was deemed entitled to his day in court. And no more is being striven for here than was granted there—the right, after discontinuance of service, to a factual trial of the issues before a tribunal of judicial character.

So important did worthy counsel for the California Public Utilities Commission deem the case of *Partnoy v. Southwestern Bell Telephone Company*, 70 P. U. R. (N. S.) 134, that the opinion is set forth in its entirety in an appendix to the brief, at a length of twenty-seven pages.

In that Missouri case, under a tariff of similar import with that here in question, discontinuance of service was

threatened by the utility following receipt by it of notice from the governor and the attorney general was being used as an instrumentality to violate the law. The customer complained against the service discontinuance. He was not denied, as was the customer appellant here, a trial upon the merits of his contention that he was entitled to the continuance of service.

Instead, represented by five attorneys, he was accorded a two day hearing before the Missouri Public Service Commission. The Commissioner's review of the testimony given at this hearing occupies no less than ten pages of the appendix (Brief *Amicus Curiae* of California Public Utilities Commission, Appendix A, pp. iv-xiv) and leaves no doubt as to the extremely thorough and meticulous character of the hearing given complainant.

On the contention that the rule denied to the complainant his right to service without due process of law, the commission wisely ruled:

"Said rule in itself cannot be held to deprive the complainant of his property, *i. e.*, the right to telephone service without due process of law, *unless the action of the company in cutting off complainant's service under said rule also operates to leave the complainant without recourse in the event said service has been terminated without justifiable cause.* Thus, in the instant case, the complainant was afforded the opportunity to show that the notice given by the governor and attorney general to the company was unsupported by fact, and the Commission in the exercise of its control over the Company is empowered to order said service restored. . . .

“ . . . said rule in itself in no wise operates to deny subscribers the right to test its application to their particular use of the telephone service in the event the right to such use is challenged by law enforcement officials. . . .” (Brief *Amicus Curiae* of California Public Utilities Commission, Appendix A, pp. xx-xxi.)

Thus the position of the Commission in the Missouri case coincides most markedly with the one taken by this *amicus curiae* in the instant case. In such a situation as is here presented, a full hearing must be given before a tribunal. The tariff can in no way bar, without constituting a violation of due process, subsequent review upon the insistence of a complaining customer desiring to show that the service has been cut off without the existence in fact of justifiable cause.

It clearly appears that in the above-cited cases the subscriber to the intrastate wire facilities was accorded a fair hearing before an appropriate tribunal under the applicable state law. Due process similarly requires that appellant, a subscriber to Western Union's interstate Morse wire facility, be accorded a hearing of like character under Federal law. Section 406 of the Federal Communications Act specifically provides appellant with a remedy in the district court to compel restoration of his leased wire service. Therefore, it is plain that this tribunal is the one wherein must be held the constitutionally-required hearing as to whether or not at the time of the notice service was being supplied contrary to law.

III.

This Court, in Its Decision of December 1, 1948, Has Misconstrued and Hence Failed to Apply the Holding of the California Case, *People v. Brophy*, Which Holding It Is Required to Follow Under the Constitution and Applicable Choice of Law Rules.

- A. The Always-Existent Requirement That Federal Courts Must Follow State Decisions Has in Recent Years Been Broadened and Given Compelling Force.

Since the earliest days of our nation, much legislative and judicial effort has been expended in solution of the problems raised by our federal system's concurrent jurisdiction of state and federal courts. In 1789 there was passed Section 34 of the Federal Judiciary Act, which, as somewhat amended, presently provides (28 U. S. C. A. 1652):

“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”

The case of *Swift v. Tyson*, 16 Pet. 1, by judicial interpretation, excepted certain limited questions of so-called “general law” from this requirement.

In the modern case of *Erie Ry. Co. v. Tompkins*, 304 U. S. 64, even this small exception was wiped out. It was here held that the exception had been violative of the Federal Constitution, as well as being based upon a misinter-

pretation of the Rules of Decision Act. The court said flatly:

“Except in matters governed by the Federal Constitution, or by Acts of Congress, the law to be applied in any case is the law of the State.” (Page 78.)

In later cases, the wide sweep of *Erie Ry. Co. v. Tompkins* has been repeatedly manifested. Thus, federal courts are required to follow the announcements of the state law even though they believe that the rule is unsound in principle or that some other is preferable. (*West v. American Telephone and Telegraph Company*, 311 U. S. 223.) Herein it was declared also:

“. . . the obvious purpose of 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be valid in the state courts, the other to be availed of in the federal courts, only in cases of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision, whenever the highest court of the state has not spoken.”

In the case of *Six Companies v. Highway District*, 311 U. S. 180, 188, it was similarly held that a federal court was required to apply an announcement of the state law made by an intermediate state appellate court.

In the same vein, it was stated in the case of *Fidelity Trust Co. v. Field*, 311 U. S. 169:

“An intermediate state court declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more con-

vincing evidence of what the state law is, should be followed by a federal court in deciding a state question.” (Pp. 177-8.)

See too:

Stoner v. New York Life Insurance Co., 311 U. S. 464, 467.

The general rule applies in equity cases. (*Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202.) This decision was reached even while the Rules of Decision Act still spoke of “trials at common law,” rather than broadly of “civil actions,” as it does today.

B. This Court's Opinion Misconstrues and Fails to Follow the Holding of the Binding California Case of *People vs. Brophy*.

This court has said in its opinion, in discussing the meaning of the tariff's phrase “contrary to law”:

“It is not necessary that there be a guilty participating of the sender of the messages to the drop. The guilty use of the drop in receiving the messages is enough to show an illegal use of the wire's service.” (Page 3, last four lines.)

We turn now to a discussion upon principle of the consonance of the conclusions of this court with the holding of the California court in the case of *People v. Brophy*, 49 Cal. App. 2d 15, petition for hearing by the California Supreme Court denied February 5, 1942.

The California District Court of Appeals, an intermediate appellate court, held that since the furnishing of racing information even to bookmakers, and even knowingly, and the receipt of such information by bookmakers, would not be in violation of any law, an affidavit concerning such furnishing of racing information was not relevant to any possible issue in a suit brought by the utility customer to enjoin the discontinuance of service under the above quoted tariff.

The California court said at page 33:

“Respondent’s claim that the furnishing of racing news to bookmaking establishments by telephone constitutes an aiding and abetting in a violation of section 337a of the Penal Code is without merit. *It is not the transmission by use of a telephone of information concerning the results of probable results of horse races that constitutes a violation of the quoted Penal Code section*, but it is the use which persons may make of such information in the acceptance of bets or maintaining places for the reception of bets that constitutes a violation of the law.” (Page 33.) (Emphasis supplied.)

“Furthermore, the furnishing *or receiving* of racing or sporting information is not gambling and is not a crime.” (Page 34.) (Emphasis supplied.)

The California court is thus holding with utmost clarity, and most importantly, that the use made of a bookmaker’s telephone in receiving racing information would not be a crime, even though the later use made *of the information*

itself (not of the telephone) in the acceptance of bets or maintaining places for the reception of bets may constitute a crime.

Yet the opinion of this court states that "The guilty use of the drop in receiving the service is enough to show an illegal use of the wires' service." The fact is that the California court with unquestionable precision has held, as the above quotations show, that the use of communications service to receive the messages is *not* a "guilty use." Therefore the use of the drop (a legally innocent act under the California holding binding upon this court) is *not* enough "to show an illegal use of the wires' service," as this court has said. Neither the use of the telephone (or here the analogous drop) knowingly to furnish information to bookmakers, nor the later use of the information thus received by bookmakers in accepting bets or maintaining an establishment for receiving bets could, in the face of the sharp distinction drawn on this issue by the California court, make guilty the "use of the drop in receiving the messages."

It is submitted that the foregoing quotations and their immediately-following paragraphs of analysis and comparison of decisions, though brief, yet comprise a sufficient and self-contained demonstration that this court has indeed misconstrued the controlling *Brophy* case in a vital respect. Any belaboring of this shortly-put but important point would be tedious and repetitious, and of no additional assistance to this court.

IV.

The Opinion of This Court Misconstrues the Transcript of Record to the Detriment of Consolidated Publishing Company.

It appears that this court has misconstrued the record in such a way as to misinterpret the position of the Consolidated Publishing Company and the entire nature of the relief sought in this suit.

Thus, the court states:

“ . . . McBride seeks to ‘compel the restoration to him’ by the Telegraph Company of the telegraph wire service to transmit track news between cities in eastern states and California cities and the use of Morse telegraph instruments, called drops, in the latter cities, which telegraphically receive such news.”
(Page 1, line 2.)

This is not the fact, since appellant seeks only the furnishing of facilities between itself and Consolidated Publishing Company. This is plainly demonstrated by appellant’s prayer in his complaint. [Tr. 11, 12.]

The court further states:

“McBride’s racing news from the race tracks of other states was sold to a California corporation, Consolidated Publishing Company of Los Angeles. *Through the latter’s direction*, the out of state racing news was received through the drops in various places in California.” (Page 4, line 2.)

It is nowhere shown in the Transcript that it was through any direction of Consolidated Publishing Company that the news was received "in various places in California." The record is to the contrary. For example, it is alleged by appellant in his complaint that

"Each of Plaintiff's customers receives its sporting and racing news service by direct connection with the main interstate Morse wire." [Tr. 3-4.]

The court's finding on this point consists only of a denial based upon lack of information and belief. [Tr. 80.]

It is highly probable that these noted misconceptions by the court significantly infected with error its views of what the facts were to which the holding of the *Brophy* case should be applied. For this reason, as well as generally to point out to the court the actual relation of the Consolidated Publishing Company to the total situation, these misconceptions have been pointed out.

V.

This Court's Interpretation of Tariff 219(8) Would Render It Invalid as a Weapon of Censorship and Prior Restraint on Publication, Thus Denying to Those Subject to the Tariff and Their Customers That Freedom of the Press Which Is Guaranteed by the First Amendment.

Virtually every modern newspaper is heavily dependent for its news and information upon service provided by one or more of a number of generalized or specialized news services. Such news services are wire facility customers of appellee or of other utilities with tariffs of similar import.

Under the interpretation given Tariff 219(8) by the December 1, 1948, opinion of this court, such tariffs may be used by any police or prosecution agency as a most powerful weapon to impose upon printed publications a brutally effective and arbitrary system of censorship and prior restraint upon publication. For newspapers cannot survive without wire news service; and these wire news services, under the opinion of this court, may be barred to them forever without right of review if any law enforcement agency notifies the utility owning the communication facility through which service is received that such service is being received contrary to law.

Thus plainly the mere threat of such notice would suffice to bring any newspaper to terms. Under the court's interpretation of the tariff any law enforcement agency might, if so inclined, exact toll or compel obedience, under penalty of virtual journalistic death, to whatever political credo it deemed proper.

Such throttling of publishing concerns is forbidden by the First Amendment to the Constitution, prohibiting the passage of laws abridging the freedom of the press.

It is clear under modern decisions that the unconstitutionality of such a control would not be averted by its indirect nature. Thus, in the case of *Grosjean v. American Press Company*, 297 U. S. 233, the Supreme Court held invalid a Louisiana statute which in form purported only to levy a tax upon newspapers measured by circulation, but in reality sought to control the press by a subtle prior restraint.

Decisions particularly applicable to the situation of appellant and the Consolidated Publishing Company show that they are included within the broad scope of the amendment's protection. As was said in the case of *Lovell v. Georgia*, 303 U. S. 444, "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." (Page 452.)

In writing the opinion of the court in *Near v. Minnesota*, 283 U. S. 697, Chief Justice Hughes commented acidly of an effort to evade the amendment's protection:

"Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." (Page 720.)

This same case furnishes still other strong evidence of the Constitution's powerful protection against any kind of prior restraint on press publications. The opinion of Chief Justice Hughes held that even if every publication

of a scurrilous newspaper violated someone's civil rights or some criminal law, the preliminary freedom from censorship could not be abrogated.

In this case in a dissenting opinion by Justice Butler at pages 733-4, there is quoted a passage from Blackstone's Commentaries (Book IV, page 152):

“To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution (of 1688) is to subject all freedom of sentiment to one man.”

But this court's interpretation of Tariff 219(8) would subject freedom of sentiment to any one or all of a hundred or a thousand men. It is therefore again respectfully submitted that the very unreasonableness of such a tariff interpretation should sufficiently militate against its adoption by this court.

Conclusion.

This *amicus curiae* respectfully submits that the decision of this Honorable Court is erroneous in the particulars above discussed, and that Appellant's Petition for Rehearing should be granted for the full presentation of the important questions involved.

Respectfully submitted,

WYMAN G. REYNOLDS,

1010 Chester Williams Building, Los Angeles 13,

LAWRENCE WILLIAM STEINBERG,

214 North Canon Drive, Beverly Hills,

*Attorneys for Consolidated Publishing Company,
Amicus Curiae.*

~~ORIGINAL~~

No. 11970

United States
Circuit Court of Appeals
for the Ninth Circuit

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,
Appellant,

vs.

FREDERICK I. RICHMAN and LYDA BLITHE
RICHMAN NAGEL,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

SEP 1 1948

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record ing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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For Appellees:

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Los Angeles 13, Calif. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern
District of California, Central Division

No. 504-BH

FRANK R. CREEDON, Housing Expediter, Office
of the Housing Expediter,

Plaintiff,

vs.

FREDERICK I. RICHMAN, LYDA BLITHE
RICHMAN NAGEL, DOE I and DOE II,
Defendants.

COMPLAINT FOR RESTITUTION AND
INJUNCTION

FOR A FIRST CAUSE OF ACTION

I.

Plaintiff, as Housing Expediter, Office of the Housing Expediter, brings this cause of action for restitution pursuant to Section 205(a) to enforce compliance with Section 4 of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., and the Rent Regulations (10 Fed. Reg. 13528) issued by the Administrator pursuant to Section 2 of the Emergency Price Control Act of 1942, as amended, and/or brings this cause of action pursuant to Section 206 of the Housing and Rent Act of 1947, and the Rent Regulations issued pursuant thereto.

II.

Jurisdiction of this cause of action is conferred upon this Court by Sections 205(e) of the Emergency Price Control Act of 1942, as amended, [2]

and/or Section 206 of the Housing and Rent Act of 1947.

III.

At all times mentioned herein, up to and including June 30, 1947, there was in effect a Rent Regulation for Housing, issued pursuant to Section 2(b) of the Emergency Price Control act of 1942, as amended, for the Los Angeles Defense Rental Area, and/or on and since July 1, 1947, the housing accommodations herein described have been subject to maximum rents authorized and established by the Housing and Rent Act of 1947, and rent regulations issued pursuant thereto.

IV.

That the defendants, Doe I and Doe II, are the fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants, individually and collectively herein sued.

V.

That the defendant is a resident of the City of Los Angeles, County of Los Angeles, State of California, in the Southern District of California, in the Central Division thereof, and within the jurisdiction of this Court.

VI.

During all times herein mentioned defendant has received rent for the use and occupancy of those

certain housing accommodations, subject to said Acts and Regulations within said Defense Rental Area, known and described as the Fountain Manor Apartments, 5165 Fountain Avenue, Los Angeles, California.

VII.

That on and since March 1, 1942, exclusive of the period of July 1 to July 25, 1946, inclusive, the defendant has received for the use and occupancy of the housing accommodations hereinbefore described, rents in excess of the maximum rents permitted under the said Rent Regulations and Orders of the Rent Director; that the number and names of tenants and the [3] amount of overcharges are facts peculiarly within the knowledge of said defendant; that plaintiff is unable at this time to allege with certainty the amount of rents charged in excess of said maximum rent but that plaintiff upon ascertaining the amount or amounts thereof, and the names of said tenants, will ask leave to amend this complaint and set forth the amount or amounts of said overcharges and the tenants from whom said overcharges were received.

FOR A SECOND CAUSE OF ACTION

I.

Plaintiff re-alleges and incorporates herein Paragraphs I, II, III, IV, V, VI and VII of his first cause of action as though set out in full herein.

II.

In the judgment of the Housing Expediter, Office of the Housing Expediter, said defendants have engaged in acts and practices in violation of Sec-

tion 4(a) of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., and/or in violation of Section 206(a) of the Rent and Housing Act of 1947, which acts and practices consist of violations of Rent Regulations for Housing (10 Fed. Reg. 13528) issued in accordance with Section 2(b) of the Emergency Price Control Act of 1942, as amended, and/or the Housing Regulation issued pursuant to the Housing and Rent Act of 1947, and therefore the Housing Expediter brings this cause of action pursuant to the provisions of Section 206 of the Housing and Rent Act of 1947. Jurisdiction of this cause of action is conferred by Section 206 of the Housing and Rent Act of 1947.

Wherefore, the plaintiff prays:

A. That the defendant be ordered and directed to tender to all available tenants who are entitled thereto a refund of all amounts in excess of the maximum rents established by the Emergency Price Control Act of 1942, as amended, and Regulations issued thereunder, and/or the Housing and Rent Act of 1947, and Regulations issued thereunder, which were received by the defendant, his agents, servants, employees and attorneys from said persons [4] as rent for the use and occupancy of the housing accommodations described in the complaint, since the date maximum rents were established therefor by said Acts and Regulations.

B. A preliminary and final injunction enjoining the defendants, their agents, servants, employees, and all persons in active concert or participation

with them from directly or indirectly demanding or receiving for accommodations subject to the Rent Regulations issued pursuant to the Housing and Rent Act of 1947, rents in excess of the maximum rents permitted under the Rent Regulations issued pursuant to the Housing and Rent Act of 1947.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ RICHARD G. SOLOF,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 15, 1947. [5]

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR TREBLE
DAMAGES AND INJUNCTION
FOR A FIRST CAUSE OF ACTION

I.

Plaintiff, as Housing Expediter, Office of the Housing Expediter, brings this action for injunction pursuant to Section 205(a) to enforce compliance with Section 4 and for treble damages on behalf of the United States of America pursuant to Section 205(e) of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., and the Rent Regulations (10 Fed. 13528) issued by the Administrator pursuant to Section 2 of the Emergency Price Control Act of

1942, as amended, and pursuant to Section 206 of the Housing and Rent Act of 1947.

II.

Jurisdiction of this cause is conferred upon this Court by Sections 205(c) and 205(e) of the Emergency Price Control Act of 1942, as amended. [6]

III.

At all times mentioned herein, up to and including June 30, 1947, there was in effect a Rent Regulation for Housing issued pursuant to Section 2(b) of the Emergency Price Control Act of 1942, as amended, for the Los Angeles Defense Rental Area, and on and since July 1, 1947, the housing accommodations herein described have been subject to maximum rents authorized by the Housing and Rent Act of 1947.

IV.

That the defendants, Doe I and Doe II, are the fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued.

V.

That the defendant is a resident of the City of Los Angeles, County of Los Angeles, State of California, in the Southern District of California in the Central Division thereof, and within the jurisdiction of this Court.

VI.

During all times herein mentioned defendant has received rent for the use and occupancy of those certain housing accommodations, subject to said Housing Regulation within said Defense Rental Area, known and described as the Fountain Manor Apartments, 5165 Fountain Avenue, Los Angeles, California.

VII.

Defendant received from persons for the use and occupancy of the hereinafter described accommodations, rents in excess of the maximum rents established by said Rent Regulations; that there is attached hereto and by reference made a part hereof, as though fully set out herein, a statement of [7] the names of the persons overcharged, the period of occupancy of such persons, the maximum rent, the rent received from said persons and the amount of overcharges.

VIII.

That every tenant overcharged as above alleged has failed to institute an action pursuant to Section 205(e) of the Emergency Price Control Act of 1942, as amended, and more than thirty days have elapsed since the occurrence of the violations.

FOR A SECOND CAUSE OF ACTION

I.

Plaintiff re-alleges and incorporates herein Paragraphs I, II, III, IV, V, VI and VII of his first cause of action, as though set out in full herein.

II.

In the judgment of the Housing Expediter, Office of the Housing Expediter, said defendants have engaged in actions and practices in violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., which actions and practices consist of violations of Rent Regulations for Housing (10 Fed. Reg. 13528) issued in accordance with Section 2(b) of the Emergency Price Control Act of 1942, as amended, and therefore the Housing Expediter brings this action pursuant to the provisions of Section 4(a) of the Emergency Price Control Act of 1942, as amended, and also pursuant to Section 206 of the Housing and Rent Act of 1947. Jurisdiction of this action is conferred by Section 205(c) of the Emergency Price Control Act of 1942, as amended, and Section 206 of the Housing and Rent Act of 1947.

Wherefore, the plaintiff demands:

A. Judgment for the plaintiff to recover of the defendant treble the total amounts received by the defendant from persons as rent for the use and occupancy of the housing accommodations described in the complaint, which were in excess of the maximum rents established by the Emergency Price Control Act of 1942, as amended, and Regulations issued thereunder, and further that; [8]

B. The defendant be ordered and directed to tender to all available tenants as are entitled there-to a refund of all amounts in excess of the maximum rents established by the Emergency Price Control

Act of 1942, as amended, and Regulations issued thereunder which were received by the defendant, his agents, servants, employees and attorneys from said persons as rent for the use and occupancy of the housing accommodations described in the complaint, since the date maximum rents were established therefor by said Regulations, provided that refunds made by the defendant to such persons, in compliance with the directions of the Court for rents received within one year prior to the bringing of this action, shall be deducted from the amount of the judgment prayed for in the preceding Paragraph "A".

C. A preliminary and final injunction enjoining the defendants, their agents, servants, employees, and all persons in active concert or participation with them from directly or indirectly demanding or receiving, for accommodations subject to the Rent Regulations for Housing, rents in excess of the maximum rents permitted under the Rent Regulations for Housing, or any other Regulations for Housing issued pursuant to the Housing and Rent Act of 1947.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ RICHARD G. SOLOF,
Attorneys for Plaintiff.

SCHEDULE OF RENTS—5165 Fountain Avenue, Los Angeles, California.

RECEIVED BY DEFENDANT, HANNAH E. WEITZ

Apt. No.	Tenants Name	Period of Occupancy	Rent Collected	Maximum Legal Rent	Amount of Overcharges
206	A. N. Castro.....	9- 1-42 to 1- 7-44	\$ 60.00	\$45.00	\$25.00
204	Billie Klein	4- 1-43 to 11- 1-43	75.00	70.00	40.00
219	Frank A. Lawria.....	9-12-43 to 1-15-44	40.00	35.00	20.00
304	S. B. Temple	11- 1-42 to 1-15-44	65.00	60.00	67.49
401	Mr. & Mrs. Wm. J. McNichol 12- 1-42 to 1-15-44 (Mrs. McNichol's maiden name, Margaret Sundberg)		100.00	75.00	312.50
413	Morris Munitz	April 1943 to June 15, 1944	52.50	47.50	47.90
Total Overcharges					<u>\$712.89</u>

SCHEDULE OF RENTS—5165 Fountain Ave., Los Angeles, Calif.

Received by Defendants—Frederick I. Richman, Lydia Blithe Richman Nagel, and Doe II.

Apt. No.	Tenant's Name	Period of Occupancy	Rent Collected	Maximum Legal Rent	Amt. of Overcharges
114	Mrs. J. B. Norton.....	Sept. 7, 1947 to Sept. 30, 1947	\$24.50 per wk.	\$15.50 per wk.	\$32.50
206	A. N. Castro.....	Jan. 7, 1944 to Dec. 30, 1945	\$60.00 per mo.	\$45.00 per mo.	\$345.00
210	Zelda Adelman.....	Aug. 1, 1947 to Sept. 30, 1947	\$50.00 per mo.	\$40.00 per mo.	\$20.00
219	Frank A. Lauria.....	Jan. 16, 1944 to May 26, 1944	\$40.00 per mo.	\$35.00 per mo.	\$21.66
219	Frank A. Lauria.....	May 27, 1944 to Sept. 30, 1947	\$45.00 per mo.	\$35.00 per mo.	\$390.00
223	Mrs. Julia Klein.....	Jan. 16, 1944 to May 5, 1944	\$95.00 per mo.	\$80.00 per mo.	\$54.50
304	S. B. Temple.....	Jan. 15, 1944 to May 1, 1944	\$65.00 per mo.	\$60.00 per mo.	\$17.49
304	S. B. Temple.....	May 1, 1944 to Aug. 1, 1946	\$70.00 per mo.	\$60.00 per mo.	\$260.00
306	Harold Leyton.....	March 28, 1947 to Sept. 30, 1947	\$ 4.00 per day	\$80.00 per mo.	\$296.00
323	Harry Wayne McMahan.....	July 21, 1944 to Aug. 3, 1944	\$.72 per day for 4th person	no registra- tion for 4 occupants	\$9.36

Schedule of Rents—5165 Fountain Ave., Los Angeles, Calif. Received by Defendants—Frederick I. Richman,
Lydia Blithe Richman Nagel, and Doe II.—(Continued).

Apt. No.	Tenant's Name	Period of Occupancy	Rent Collected	Maximum Legal Rent	Amt. of Overcharges
401	Mr. & Mrs. Wm. J. McNichol.....	Jan. 16, 1944 to July 1, 1944	\$110.00 per mo.	\$95.00 per mo.	\$82.00
401	Mr. & Mrs. Wm. J. McNichol.....	July 1, 1944 to Oct. 20, 1944	\$100.00 per mo.	\$75.00 per mo.	\$91.66
401	John C. Houchins.....	July 23, 1947 to Sept. 6, 1947	\$52.50 per wk.	\$30.00 per wk.	\$138.75
407	Mrs. Russell Simpson.....	May 1, 1944 to April 10, 1946	\$75.00 per mo.	\$65.00 per mo.	\$233.35
408	Mr. Vincent Murphy.....	July 17, 1947 to Oct. 2, 1947	\$24.50 per wk.	\$15.00 per wk.	\$104.50
412	Mr. Harold Cousins.....	May 15, 1944 to Aug. 15, 1947	\$57.50 per mo.	\$47.50 per mo.	\$380.00
413	Mr. Morris Munitz.....	Jan. 15, 1944 to May 15, 1944	\$52.50 per mo.	\$47.50 per mo.	\$20.00
413	Mr. Morris Munitz.....	May 15, 1944 to Sept. 30, 1947	\$50.00 per mo.	\$47.50 per mo.	\$97.50
418	Mr. Evan Whitlock.....	Nov. 16, 1945 to Dec. 15, 1946	\$24.50 per wk.	\$17.50 per wk.	\$84.00
Total Overcharges.....					\$2,678.32

On or about May 1944 defendants, Frederick I. Richman and Lydia Blithe Richman Nagel decreased services and have ever since furnished decreased services in the following particulars, to wit:

1. Decreased linen service
2. Decreased garbage removal
3. Discontinuation of cleaning and maintenance of furnishings
4. Discontinuation of replacement of furnishings
5. Discontinuation of demothring service and insect control

6. Decreased cleaning service of the hallways which said decreased services result in unliquidated overcharges which are in addition to the liquidated overcharges hereinbefore set forth.

Statement referred to in Paragraph VII of Plaintiff's amended complaint.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Oct. 10, 1947. [12]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS FREDERICK I.
RICHMAN AND LYDA BLITHE RICHMAN
NAGEL

Come now the defendants Frederick I. Richman and Lyda Blithe Richman Nagel, and answering the plaintiff's amended complaint on file herein for themselves alone and not for any or either of their co-defendants, admit, deny and allege as follows, to wit:

ANSWER TO PURPORTED FIRST CAUSE
OF ACTION

I.

Answering paragraph I of the purported First Cause of Action set forth in said amended complaint, these defendants and each of them allege that the Emergency Price Control Act of 1942, as amended, (USCA Title 50, App. Sec. 901 et seq.) terminated or expired on June 30, 1947, and from and after said date no maximum rents were maintained or established under or by authority of said Act with respect to any housing or hotel accommodations whatsoever.

II.

Answering paragraph II of said purported First Cause of Action, these defendants and each of them deny that jurisdiction of [14] this action is conferred upon this Court by Sections 205(c) and 205(e) of the Emergency Price Control Act of 1942, as amended, or by any other term or condition of said Act; and in this connection these defendants and each of them allege that said Emergency Price Control Act of 1942 terminated as of June 30, 1947.

III.

Answering paragraph III of said purported First Cause of Action, these defendants and each of them deny that on and since July 1, 1947, on or since July 1, 1947, the premises or accommodations referred to in said complaint have been subject to maximum rents either under the Housing and Rent Act of 1947, or otherwise, or at all; and in this

connection these defendants allege that the premises and accommodations referred to in said amended complaint are not and have not been "controlled housing accommodations" within the meaning of the Housing and Rent Act of 1947.

IV.

Answering paragraph V of said purported First Cause of Action, these defendants and each of them admit that the defendant Frederick I. Richman is a resident of the City of Los Angeles, County of Los Angeles, State of California; but these defendants deny that the defendant Lyda Blithe Richman Nagel is or was at any time in said amended complaint mentioned a resident of the State of California.

V.

Answering paragraph VI of said purported First Cause of Action, these defendants deny that the accommodations or premises mentioned in said amended complaint are or ever have been subject to said or any housing regulation within said or any defense rental area; and in this connection allege that, save and except as hereinafter expressly admitted, no part or portion of the premises or accommodations have been or are subject to any housing regulation issued within said or any defense rental area.

Further answering said paragraph, these defendants and each [15] of them allege that they are trustees under a declaration of trust executed November 1, 1945, and that as such trustees, have been ever since January 2, 1946, and now are the owners of the Fountain Manor Apartment Hotel, situate

at 5165 Fountain Avenue, which building is and at all times has been known as the Fountain Manor Apartment Hotel and not as the Fountain Manor Apartments.

VI.

Answering paragraph VII of said purported First Cause of Action, these defendants and each of them deny that they have received rents in excess of the maximum rents established for said premises by any rent regulation either as in said paragraph alleged, or otherwise, or at all, and with particular reference to the exhibit or statement referred to in said paragraph VII, these defendants admit, deny and allege as follows, to wit:

(a) "Apartment No. 114." Allege that said accommodations have not been since June 30, 1947, and are not now, subject to a maximum rent either as alleged in said amended complaint or otherwise, or at all;

(b) "Apartment No. 206." Allege that on March 16, 1945 (OPA Docket No. 56342), the rate for said unit was fixed by the then Office of Price Administration at \$60.00 per month; that prior hereto these defendants restored or repaid to A. N. Castro the difference between \$45.00 and \$60.00 per month for the period from January 17, 1944, to March 16, 1945;

(c) "Apartment No. 210." Allege that said unit has not been since June 30, 1947, and is not now subject to any maximum rent either as alleged in said amended complaint or otherwise, or at all;

(d) "Apartment No. 219." Allege that on acquiring the premises, these defendants were advised by the former owner that the maximum rent for said unit was \$45.00; [16] that thereafter and on September 26, 1945 (OPA Docket No. 200403), the then Office of Price Administration reduced the rate for said unit to \$35.00 per month; that since said date there has been paid for said accommodations by the occupant thereof, to wit, Frank A. Lauria, the sum of \$35.00 and no more; that prior hereto these defendants repaid and restored to said Frank A. Lauria the excess of \$10.00 per month paid for said unit over and above the maximum rate fixed therefor prior to said September 26, 1945.

These defendants further allege that since June 30, 1947, said unit has not been and is not now subject to any rent regulation either as alleged in said amended complaint or otherwise, or at all;

(e) "Apartment No. 223." Allege that defendants collected for the use and occupancy of said unit the sum of \$80.00 per month and no more; deny that they collected the sum of \$95.00 or any sum in excess of said \$80.00;

(f) "Apartment No. 304." Allege that the maximum rate for said unit fixed by the then Office of Price Administration pursuant to regulations issued for hotel and residential hotel accommodations under the Emergency Price Control Act of 1942, as amended, was the sum of \$70.00 per month;

Allege that said unit has not been since June 30, 1947, and is not now subject to any maximum rent

regulation either as alleged in said complaint or otherwise, or at all;

(g) "Apartment No. 306." Allege that since March 14, 1947, said unit has not been and is not now subject to any maximum rent regulation either as alleged in said complaint or otherwise, or at all;

(h) "Apartment No. 323." Deny that any sum or amount whatsoever in excess of the maximum rate relating to said unit was collected for the use or occupancy thereof during the dates alleged in said complaint or otherwise, or at all;

(i) "Apartment No. 401." Allege that at the time these defendants acquired said premises, the registered rate for said unit was as follows: \$100.00 per month for one or two persons and \$110.00 per month for three persons; that thereafter and on or about September 26, 1945, the then Office of Price Administration determined that the proper rate for said unit was as follows: \$85.00 for one person, \$75.00 for two persons, and \$95.00 for three persons; that upon said determination the defendants repaid to the occupants of said unit \$300.00 collected in excess of the amount determined as hereinbefore alleged to have been the ceiling for said unit; that save and except as herein admitted and alleged, these defendants deny generally and specifically each and all of the allegations relating to said apartment in said amended complaint contained; and further allege that since July 1, 1947, said unit has not been and is not now subject to

any maximum rent regulation either as in said amended complaint alleged or otherwise;

(j) "Apartment No. 407." Allege that the maximum rate fixed for said unit by the then Office of Price Administration pursuant to the regulations relating to hotels and residential hotels is and was the sum of \$75.00 between the dates of May 1, 1944, to April 10, 1946, inclusive; [18]

(k) "Apartment 408." Allege that since June 30, 1947, said unit has not been and is not now subject to any maximum rent as alleged in said amended complaint or otherwise, or at all;

(l) "Apartment 412." Allege that from May 15, 1944, to June 30, 1947, the maximum rent fixed for said unit by the Office of Price Administration pursuant to regulations issued for hotels and residential hotels was the sum of \$57.50; and further allege that since June 30, 1947, said unit has not been and is not now subject to any maximum rent either as alleged in said complaint or otherwise, or at all;

(m) "Apartment No. 413." Allege that on May 1, 1944, the then Office of Price Administration (OPA Docket No. 18699) fixed the maximum rate for said unit at \$50.00 per month, and there has been paid for the use and occupancy of said unit since said date the sum of \$50.00 per month and no more; allege that since June 30, 1947, said unit has not been and is not now subject to any maximum rent either as alleged in said complaint or otherwise, or at all;

(n) "Apartment No. 418." Allege that the rate

fixed by the then Office of Price Administration as the maximum rate for said unit was between the dates of November 16, 1945, to December 15, 1946, inclusive, the sum of \$3.50 per day, and save and except as herein admitted and alleged these defendants deny each and every allegation relating to said apartment in said paragraph contained.

Further answering said paragraph VII of said purported First Cause of Action, these defendants and each of them deny that they have collected or received the sum of \$2678.32 or any other amount or sum whatsoever in excess of the maximum legal rate applicable to said units. [19]

ANSWER TO PURPORTED SECOND CAUSE OF ACTION

I.

Defendants refer to and adopt Paragraphs I, II, III, IV, V and VI of their Answer to the purported First Cause of Action set forth in said amended complaint, as fully and completely as if the said Paragraphs and each of them were here copied and set forth at length.

II.

Answering paragraph II of said purported Second Cause of Action, these defendants allege that the Emergency Price Control Act of 1942 terminated as of June 30, 1947. Further answering the said paragraph, these defendants deny, save and except as hereinbefore expressly admitted, that they have received or accepted for any of the units

referred to or described in the complaint on file herein any rent or rate in excess of the maximum rent or rate applicable to the unit in question.

As a first, separate and affirmative defense to the amended complaint on file herein, these defendants allege:

I.

That any cause of action of the plaintiff herein for or on account of any amount or amounts received by the defendant herein for the use or occupancy of any of the units described in the said complaint prior to the 10th day of October, 1946, is barred by the provisions of Section 925 of the Emergency Price Control Act of 1942, as amended (USCA Title 50, App. Sec. 901 et seq.).

As a second, separate and affirmative defense to the amended complaint on file herein, these defendants allege:

I.

That on January 17, 1944, and at all times since said date, to January 2, 1946, the defendants Frederick I. Richman and Lyda Blithe Richman Nagel were the owners of the property hereinafter mentioned; that since said January 2, 1946, said defendant were and now [20] are the owners as trustees under the declaration of trust dated November 1, 1945, of the Fountain Manor Apartment Hotel, situate at 5165 Fountain Avenue, Los Angeles, California, which is the same building and premises described and referred to in the amended complaint on file herein.

II.

That on June 30, 1947, and at all times subsequent thereto, said Fountain Manor Apartment Hotel has been and now is commonly known as a hotel in the community in which it is located and occupied by persons who are provided with customary hotel service such as maid service, furnishing and laundering of linens, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bell-boy service, and since said date has not been and is not now subject to control by plaintiff herein.

III.

That pursuant to regulations issued by the plaintiff herein under and pursuant to the Housing and Rent Act of 1947, the plaintiff herein found and determined that the said Fountain Manor Apartment Hotel was on June 30, 1947, and at all times subsequent thereto has been an establishment which is commonly known as a hotel in the community in which it is located and was and is occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures and bell-boy services, and therefore was not subject to control by the plaintiff herein.

Wherefore Defendants Pray: That plaintiff take nothing by its amended complaint on file herein; that defendants recover their costs of suit herein incurred and expended; and for such other and

further affirmative relief as the Court deems proper in the premises.

/s/ FREDERICK I. RICHMAN,
and

/s/ ALLEN T. LYNCH,
BAILIE, TURNER & LAKE,

By /s/ ALLEN T. LYNCH,

Attorneys for Defendants, Frederick I. Richman
and Lyda Blithe Richman Nagel.

[Verified.]

[Affidavit of service by mail attached.]

[Endorsed]: Filed Nov. 3, 1947. [21]

[Title of District Court and Cause.]

DISMISSAL WITH PREJUDICE AS TO
DEFENDANT HANNAH E. WEITZ

Plaintiff hereby dismisses the above entitled action with prejudice as to defendant Hannah E. Weitz.

Dated this 30th day of December, 1947.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
CASSEL JACOBS,

By /s/ CASSEL JACOBS,

Attorneys for Plaintiff.

Judgment entered Dec. 31, 1947. Docketed Dec. 31, 1947, Book 47, Page 625. Edmund L. Smith, Clerk.

[Endorsed]: Filed Dec. 31, 1947. [23]

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

The pretrail stipulation which is quoted beginning at line 31, page 1 of plaintiff's proposed findings of fact and conclusions of law should be deleted. Paragraph 1 of the stipulation constitutes an amendment of the pleadings and consequently has no place in the findings of fact and conclusions of law. Paragraph 2 of the stipulation defines the fact issue and states the applicable law. Counsel for defendants at the trial of the case contended that Paragraph 2 was in no way binding upon the Court or upon the parties. Counsel for defendants and the Court proceeded in the trial of the case without regard to Paragraph 2 of the stipulation either as to the statement of law therein or the limitation of the issues of fact. Consequently, the incorporation of Paragraph 2 in the findings of fact and conclusions of law is only misleading..

Only stipulations of evidential facts are properly incorporated in findings.

8 Cyclopedia of Federal Procedure, Section 3417. [26]

II.

The recitation in the findings beginning at line 5 on page 3 of the evidence offered does not state the complete offer of evidence made. In addition

to the testimony relative to Apartment No. 412, it was stipulated by the parties that the testimony of plaintiff's witnesses, Mrs. Marie B. Schoening, Mrs. Roberta Strobl, and Mrs. Russell Simpson, would relate to overcharges prior to July 1, 1947. These witnesses were then dismissed because under the ruling of the Court their testimony would not have been received. The recital of the proceedings should include this stipulation if they are to recite the evidence in detail as is done in this paragraph of the findings.

III.

Paragraph 2 appearing on page 3 of the findings is incorrect. The Federal District Court has jurisdiction of any case brought by the Housing Expediter under the Emergency Price Control Act of 1942, as amended and extended, or the Housing and Rent Act of 1947.

Bell v. Hood (1945), 90 L. Ed. 939, 327 U. S. 678, 66 S. Ct. 773.

IV.

The findings beginning with the word "each" at line 29 on page 33 are entirely beyond any evidence introduced by defendants.

V.

The findings beginning at line 2 on page 4 where it reads, "and at all times in said complaint alleged, the maximum rent for said Apartment No. 412 was in the sum of \$57.50 per month for occupancy by 3 persons" was not shown by the evidence or established as law. The findings beginning with the

word "and" at line 6 on page 4 and finishing the paragraph was not established in law or in fact.

The evidence established just the reverse. Mr. Cousins paid \$57.50 rent for Apartment No. 412 on August 15, 1946. That testimony is uncontradicted. Therefore Mr. Cousins made one excessive rental payment within one year of the filing of the complaint. The evidence shows that at this time the legal maximum rent [27] was \$47.50. Therefore judgment should be for the plaintiff for treble the amount of this overcharge.

The defendants' testimony showed that on March 1, 1942, "the base period," Apartment No. 412 was occupied by two persons only. The uncontradicted testimony of Mr. Cousins showed that he rented the apartment for three people in April 1942 and paid \$47.50 rent. Since this was the first renting to three people after the inception of rent control, the renting established the rate for three people at \$47.50. Therefore, the findings to which I have objected were established neither in fact nor in law at the trial.

VI.

There is no Section 925 of the Emergency Price Control Act of 1942, which is cited at line 29 on page 4. I presume that the section intended is Section 205.

VII.

The conclusion of law in Paragraph 3 at page 4 is not deducible from the evidence. Plaintiff only attempted to show rent overcharges prior to July 1,

1947, and offered no evidence of any acts of defendants Richman and Nagel since that date. Plaintiff acted in accordance with the pretrial stipulation as to the issue of fact, and this conclusion of law is a finding entirely outside the pleadings.

Dated this 16th day of March, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
CASSEL JACOBS,

By /s/ CASSEL JACOBS,
Attorneys for Plaintiff.

Overruled. March 18, 1948.

/s/ CHARLES C. CAVANAH,
Judge. [28]

Received the within Plaintiff's Objections to Defendants' Proposed Findings of Fact and Conclusions of Law this 16th day of March, 1948.

BAILIE, TURNER & LAKE,

By /s/ D. YOUNG,
Attorneys for Defendants.

[Endorsed]: Filed March 16, 1948. [29]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial before the Honorable Charles C. Cavanah sitting as Judge of the above entitled court, on the 11th day of February, 1948, at the hour of 10:00 o'clock a.m., Cassel Jacobs, Esq. appearing as counsel for plaintiff, and Allen T. Lynch of Bailie, Turner & Lake appearing as counsel for the defendants, Frederick I. Richman and Lyda Blithe Richman Nagel, and Tighe Woods having been substituted as plaintiff herein, and the plaintiff having dismissed as to all defendants except as to the said defendants Richman and Nagel, and it appearing that a pre-trial stipulation was made and entered into by and between the plaintiff and said defendants reading as follows (omitting title and signatures):

“Plaintiff, and defendant Frederick I. Richman, and defendant Lydia Richman Nagel, through their respective attorneys, stipulate as follows: [30]

“1. The schedule to plaintiff’s amended complaint shall be amended by striking out all items except the following:

Apt.	Tenant’s Name	Period of Occupancy	Rent Collected	Maximum Legal Rent	Amount of Overcharge
407	Mrs. Russell Simpson	May 1, 1944 to April 10, 1946	\$75.00 per mo.	\$65.00	\$233.53
412	Mr. Harold Cousins	May 15, 1944 Aug. 15, 1947	\$57.50 per mo.	\$47.50 per mo.	\$380.00
Total					\$613.35

“The only fact at issue relative to the aforesaid items is the maximum legal rent. This fact at issue is whether each of said apartments was occupied by 2 or 3 people on March 1, 1942 the ‘base period’. If 2 people occupied the apartment during the base period, the rent collected by the defendants was not in excess of the maximum rent. On the other hand, if 3 people occupied the apartment during the base period, then the rent collected by the defendants was in excess of the maximum rent to the extent hereinbefore indicated.

“Dated at Los Angeles, California this 27 day of January, 1948.”

And it appearing to the court that this action was commenced on the 14th day of August, 1947, and the Court having determined at the commencement of the trial, that as a matter of law the plaintiff had no cause of action on account of the alleged violations relating to Apartment No. 407 referred to in the foregoing stipulation, and that plaintiff had no cause of action for the recovery of any rents paid in excess of the maximum fixed under the Housing and Rent Act of 1947, but only a cause of action under said act for injunctive relief to enjoin any act or practice that constituted a violation of the said act, and that the Court might, if it determined that the defendants were guilty of any such act or practice, grant injunctive relief restraining the defendants from engaging in such act or practice, and incidental to such injunctive relief, order the defendants to [31] restore to the tenant any excess rent collected since the effective date of the

said Housing and Rent Act of 1947, and which formed the basis for the injunctive relief. Thereupon, evidence was offered and received concerning the alleged violations relating to Apartment No. 412 referred to in the foregoing stipulation, and the Court having considered said evidence, the stipulation of counsel, and the agreement made by counsel, finds:

1. That the allegations contained in Paragraph I of defendants' answer to the plaintiff's amended complaint are and each of them is true.

2. That no jurisdiction of this action under the facts as disclosed by the amendment to the schedule attached to said amended complaint is conferred upon this Court by the provisions of Sections 205(c) and 205(e) of Emergency Price Control Act of 1942, as amended.

3. That the allegations contained in Paragraph III of the purported first cause of action in plaintiff's amended complaint are true.

4. That the said defendants Richman and Nagel are the owners of the premises described in said pre-trial stipulation and in Paragraph VI of said amended complaint, as trustees under the terms and conditions of a certain trust known as the "Richman Trust"; that the defendants received the rent referred to in said pre-trial stipulation; that the defendant Richman is and was at all times in the pleadings mentioned, a resident of the County of Los Angeles, State of California; that the defendant Nagel is and was at all times in the pleadings mentioned, a resident of the State of New Mexico;

that save and except as herein found to be true, each and all of the allegations in Paragraphs V and VI of the purported first cause of action of plaintiff's amended complaint are untrue.

5. That on March 1st, 1942, "the base period," said Apartment No. 412 was occupied by two persons only, and at all times in said complaint alleged, the maximum rent for said Apartment No. 412 [32] was in the sum of \$57.50 per month for occupancy by three persons; that on May 15th, 1944, and at all times subsequent thereto, said apartment was occupied by three persons, and the rents collected by the defendants for the use and occupancy of said apartment were not in excess of the maximum rent fixed therefor; that save and except as hereinbefore otherwise affirmatively found, each and all of the allegations contained in Paragraph VII of the purported first cause of action in plaintiff's complaint are untrue.

6. That the foregoing findings of fact pertaining to plaintiff's purported first cause of action in his amended complaint are hereby adopted by the Court as the findings of the Court in relation to Paragraph I of plaintiff's purported second cause of action in said amended complaint, and save and except as hereinbefore otherwise affirmatively found, each and all of the allegations in Paragraph II of said purported second cause of action in said amended complaint are untrue.

From the foregoing findings of fact, the Court concludes as a matter of law:

(1) That the plaintiff has no cause of action un-

der the Housing and Rent Act of 1947, for the recovery of any rents alleged to have been paid to the defendants in excess of the maximum rent fixed by said act, or for the recovery of treble the amount of such rents.

(2) That any cause of action to recover any alleged excess rents alleged to have been paid for Apartment No. 407 is barred by the provisions of Section 205 of the Emergency Price Control Act of 1942, as amended. (USCA Title 50, App. Sec. 901, et seq.)

(3) That the defendants Richman and Nagel were not, either as trustees or otherwise, engaged in any act or practice which constitutes a violation of any provision of the Housing and Rent Act of 1947, or regulations issued pursuant thereto, and are not about to engage in any act or practice which would constitute a violation of [32] any provisions of said act or any such regulation.

(4) That plaintiff is entitled to no relief herein, and is not entitled to the issuance of any injunction, and defendants are entitled to a judgment that plaintiff take nothing.

(5) That judgment be entered in accordance with the foregoing findings of fact and conclusions of law.

Dated this 19th day of March, 1948.

/s/ CHARLES C. CAVANAH,
Judge.

[Endorsed]: Filed Mar. 19, 1948. [34]

In the District Court of the United States, Southern
District of California, Central Division

No. 7504-BH (Civil)

TIGHE WOODS, Housing Expediter, Office of the
Housing Expediter,

Plaintiff,

vs.

FREDERICK I. RICHMAN, et al.,

Defendants.

JUDGMENT DENYING INJUNCTION TO
PLAINTIFF, AND DECREETING THAT
PLAINTIFF TAKE NOTHING
HEREIN

Heretofore, the above entitled action came on regularly for trial before the Honorable Charles A. Cavanah sitting as judge in the above entitled court on the 11th day of February, 1948, at the hour of 10:00 o'clock a.m., Cassel Jacobs, Esq. appearing as counsel for the plaintiff, Allen T. Lynch of Baillie, Turner & Lake appearing as counsel for the defendants, Frederick I. Richman and Lydia Blithe Richman Nagel, and the action having been dismissed as to all of the other defendants, and evidence having been offered and received, and certain stipulations made and entered into, and the court having made and signed its findings of fact and conclusions of law,

Now, therefore, it is ordered, adjudged and decreed:

(1) That the issuance of an injunction be and it is hereby denied. [35]

(2) That plaintiff take nothing herein.

Dated this 19th day of March, 1948.

/s/ CHARLES C. CAVANAH,
Judge.

Approved as to form:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
CASSEL JACOBS,
Attorneys for Plaintiff.

Received Feb. 27, 1948.

/s/ BENJAMIN CHAPMAN,
For the Plaintiff.

Judgment entered Mar. 19, 1948. Docketed Mar. 19, 1948. Book C. O. 49, Page 382.

[Endorsed]: Filed Mar. 19, 1948. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the

Ninth Circuit from the entire final judgment entered in this action on the 19th day of March, 1948.

Dated: May 20, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
CASSEL JACOBS,

By /s/ CASSEL JACOBS,
Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed May 21, 1948. [38]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY
ON APPEAL

The District Court erred in:

I.

Excluding all evidence of rental overcharges received prior to July 1, 1947.

II.

Finding that the Court was without jurisdiction under sections 205(c) and 205(e) of the Emergency Price Control Act. (Second finding of fact).

III.

Concluding that Section 205 of the Emergency Price Control Act barred recovery of rental over-

charges for Apartment No. 407. (Second conclusion of law.) [40]

Entering final judgment for defendants.

Dated this 25th day of June, 1948.

/s/ ABE I. LEVY,

/s/ CASSEL JACOBS,

Attorneys for Appellant.

Service of copy of the foregoing Statement of Points is hereby acknowledged this 25th day of June, 1948.

BAILIE, TURNER & LAKE,

By /s/ FREDERICK W. LAKE,

Attorneys for Defendants-Appellees Frederick I. Richman and Lyda Blithe Richman Nagel.

[Endorsed]: Filed June 28, 1948. [41]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

Appellant, Tighe E. Woods, as Housing Expediter, Office of the Housing Expediter, hereby designates the following portions of the Record to be included in the Record on Appeal.

1. The complaint filed August 15, 1947.
2. The amended complaint filed October 10, 1947.
3. The answer of defendants Frederick I. Richman and Lyda Blithe Richman Nagel, filed November 3, 1947.

4. Dismissal with prejudice as to defendant Hannah E. Weitz, filed December 31, 1947.

5. Transcript of the trial beginning after the noon recess on February 11, 1948, including all exhibits, but omitting the final arguments of counsel.

6. Plaintiff's objections to the proposed findings of fact and conclusions of law, filed March 16, 1948.

7. The findings of fact and conclusions of law, filed March 19, 1948.

8. Judgment of the Court entered March 19, 1948 in Civil Order Book 49 at Page 382.

9. Notice of Appeal filed May 21, 1948.

10. Statement of Points upon which appellant intends to rely upon appeal.

11. This Designation.

Dated this 30th day of April, 1948.

/s/ ABE I. LEVY,

/s/ CASSEL JACOBS,

Attorneys for Appellant.

Service of copy of the foregoing Designation of Record on Appeal is hereby acknowledged this 25th day of June, 1948.

BAILIE, TURNER & LAKE,

By /s/ FREDERICK W. LAKE,

Attorneys for Defendants-Appellees Frederick I. Richman and Lyda Blithe Richman Nagel.

[Endorsed]: Filed June 28, 1948. [43]

In the District Court of the United States, Southern
District of California, Central Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 44, inclusive, contain full, true and correct copies of Complaint for Restitution and Injunction; Amended Complaint for Restitution and Injunction; Answer of Defendants Frederick I. Richman and Lyda Blithe Richman Nagel; Dismissal with Prejudice as to Defendant Hannah E. Weitz; Pre-Trial Stipulation; Plaintiff's Objections to Defendants' Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment Denying Injunction to Plaintiff, and Decreeing that Plaintiff Take Nothing Herein; Plaintiff's Exhibit No. 1; Notice of Appeal; Statement of Points on Which Appellant Intends to Rely on Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal which, together with copy of reporter's transcript of proceedings on February 11, 1948, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 7th day of July, A.D. 1948.

(Seal) EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

In the District Court of the United States for the
Southern District of California,
Central Division

Honorable Charles C. Cavanah, Judge presiding.

No. 7504-BH-Civil

FRANK R. CREEDON, Housing Expediter, Office
of the Housing Expediter,

Plaintiff,

vs.

FRERERICK I. RICHMAN, LYDA BLITHE
RICHMAN NAGEL, DOE I, and DOE II,
Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California,
February 11, 1948

Appearances: For the Plaintiff: Messrs. Abe I. Levy, Stephen D. Monahan, Frank L. Hirst, Richard G. Solof, By Cassel Jacobs, Esquire. For the Defendants: Richman, Blithe and Nagel: Messrs. Bailie, Turner & Lake: and Allen T. Lynch, Esquire, By Allen T. Lynch, Esquire. [1*]

Los Angeles, California, Wednesday,
February 11, 1948—2:00 p.m.

The Court: You may proceed.

The Clerk: No. 7504-BH, Civil, Frank R. Creedon and so forth, plaintiff, versus Frederick I. Richman and others, defendants.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

Mr. Lynch: Defendants are ready.

Mr. Jacobs: The plaintiff is ready.

The Court: The question presented at this time is whether the Act of 1942, under which the present action is brought, applies, and is exclusive, or whether the Act of 1947 applies and is exclusive.

In determining the scope of the relief demanded by the plaintiff an analysis of the two Acts becomes necessary.

From such an analysis we find that the Act of 1942 was terminated on June 30th, 1947, and from and after that date no maximum rents were maintained or established under it with respect to housing.

While the Act of 1947 confines its terms to granting injunctive relief against acts done after its adoption, which is merely a preventive remedy and affords relief against future acts and to keep or preserve a thing in status quo.

The Supreme Court in the Porter case, which has [11] been called to my attention, was construing acts under the Act of 1942 and points out that restitution therein ordered was incidental to the granting of the injunction.

The question of granting injunctive relief was involved there for acts done under the Act of 1942.

Under that Act acts were barred after the expiration of one year, so it seems that the acts here done before the 1947 Act was adopted, were beyond one year and Congress only kept alive acts done after the adoption of the Act of 1947.

The scope of the relief here sought is provided

for and governed by the Act of 1947 which limits acts performed after its adoption and providing for injunctive relief to preserve future acts and pertains to the enforcement of the Act of 1947 and preserves the status quo of the parties.

Under the pleadings here and the two Acts of Congress in question, the scope of the evidence pertains to the acts occurring after the adoption of the Act of 1947 and the statute maintaining the status quo of the parties.

If Congress intended to grant restitution for rents in the Act of 1947 it would have said so.

The Act of 1942 was dead on June 30th, 1947 and there was no more law in the country. Then Congress took up the matter and said, "We will extend it to only," as I construe the Act, "to acts in the future and to grant injunctive relief and hold the parties in status quo." and not [12] for the recovery of back rents.

It is clear to me, and of course the Supreme Court in the Porter case didn't directly pass on the question because the new Act wasn't before the Supreme Court in the Porter case, but my conclusion, gentlemen, is that in this present action the scope of the evidence is limited to the status quo of the parties when the new Act of 1947 was passed and for acts between the parties from there on.

It appears clear to me that if Congress wanted to keep the relief for past rent question in the Act of 1947, it would have said so, but they didn't. They dropped it and that Act has gone out of existence. It is terminated. Now, there is nothing

before us other than acts committed since the 1947 Act—injunctive relief, in other words.

If the tenants were in possession of the property at the time of the 1947 Act and were complying with their contracts or with the regulations the Act of 1947 would protect them in preventing the landlord from throwing them out. That is the only question here. Do I understand that these tenants are still in possession?

Mr. Lynch: Yes, your Honor.

The Court: They are still in possession?

Mr. Lynch: Yes, your Honor.

The Court: The scope of this inquiry here, if they have complied with the Act of 1947, would go only to the [13] granting of injunctive relief and maintaining their possession if they desire it.

That is the conclusion I have reached, gentlemen, so you may proceed with your evidence.

Mr. Lynch: That has eliminated entirely from consideration the Russell Simpson matter in Apartment No. 407. There is just no violation there now.

The Court: The plaintiff is granted an exception to the rule of the court.

Mr. Jacobs: Your Honor, the two violations which I will show by my evidence, occurred prior to June 30th, 1947, and according to my pleadings those are my allegations and, under those circumstances it seems to me that there is no use—I have no evidence to present and as I understand your Honor's ruling, evidence on those two violations is not material to this action, so I would presume under those circumstances that your Honor would

want to grant the defendants' motion to dismiss. I suppose that is what he was talking about this morning.

The Court: I am not ruling on the motion to dismiss now. It is up to you gentlemen to complete this case on whatever proof you have or that you want to offer.

It may be that there were some acts since June 30th, 1947—I mean, since the 1947 Act went into effect that you want to go into. It may be you will want to put on evidence [14] that others acts were committed and that something might be due these tenants. The court will allow you that opportunity. It is just a question of when these two laws were terminated and went into effect. Your question is a little broad. I am not shutting you off as far as you think I am.

To make myself clear, as I understand the scope of these pleadings, you have a perfect right to present evidence showing the status quo of these parties and you have a perfect right to present any acts committed since the adoption of the new Act and ask for an injunction.

Mr. Jacobs: As I understand your Honor's ruling, while I may present evidence as a basis for an injunction under the new Act, I am precluded from presenting evidence looking toward restoration.

The Court: You mean back rent?

Mr. Jacobs: Restitution of rent, overcharges before June 30th, 1947.

The Court: I am not trying to tell you how to try your lawsuit, but you can show that these ten-

ants, since the adoption of the Act of 1947 have complied with the regulations and that they are in possession and ask for injunctive relief. You have a right to show that. If you do show that the new Act steps in and governs the proceeding. If you do that you are entitled to injunctive relief and for all violations of regulations, whatever they were, since the [15] new Act went in force. You have that privilege.

Mr. Jacobs: I will move the court at this time for leave to substitute Tighe Woods in place of Frank R. Creedon as the plaintiff in this action.

Mr. Lynch: I have no objection.

The Court: The motion is granted.

Mr. Jacobs: At this time I will dismiss the action as to all fictitious defendants, Doe I and Doe II.

The Court: There is no objection? The motion is granted.

Mr. Lynch: I have no objection.

Mr. Jacobs: My first witness will be Mr. Cousins, but before I begin to question Mr. Cousins, for the sake of the record here and to make my record clear, we can stipulate that the evidence or the testimony I would like to offer by Mrs. Mary B. Schoning, Mrs. Roberta Stroebel, and Mrs. Russell Simpson would be testimony relative to rent collections before June 30th, 1947, and that I need make no formal tender of that testimony so that we can save that time.

Mr. Lynch: There is no objection to that at all. The stipulation recites when those rents were paid

and recites what the amounts were, so I don't think there is any question involved as to that.

Mr. Jacobs: In that event may I ask the court to [16] excuse those witnesses, Mrs. Schoning and Mrs. Stroebel and Mrs. Simpson?

The Court: Yes, they will be excused. You don't want them to remain, counsel?

Mr. Lynch: Not so far as I am concerned.

The Court: Then they may be excused.

Mr. Jacobs: Mr. Cousins, will you be sworn?

HAROLD COUSINS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Harold Cousins.

Direct Examination

By Mr. Jacobs:

Q. Mr. Cousins, you are a resident of the Fountain Manor Apartments? A. Yes, sir.

Q. And what apartment do you occupy?

A. 412.

Q. When did you move into that apartment?

A. April 15th, 1942. [17 and 18]

Q. Where were you living before April 15th, 1942? A. 1197 North Ardmore, Los Angeles.

Q. What rent do you pay at that apartment?

A. At the present time \$57.50.

(Testimony of Harold Cousins.)

Q. What did you pay when you moved in in April of 1942? A. \$47.50.

Q. How long did you pay \$47.50 rent?

A. Until May 1944.

Q. When you moved into the apartment was there any agreement or paper signed between you and the owners of the apartment house?

A. Yes, a rent agreement and an inventory.

Q. Do you have that with you?

A. Yes, sir.

Q. With whom did you negotiate for the renting of this apartment?

A. The present owner—the owner at that time, Mrs. Weitz, and the manager, Mrs. Skellington.

Q. May I see your rent agreement?

Mr. Lynch: No objection.

Mr. Jacobs: I will offer this in evidence.

The Court: It will be received.

(The document so offered was thereupon marked Plaintiff's Exhibit No. 1, and was received in evidence.) [19]

THIS AGREEMENT entered into this 15 day of April, 1948 by and between
 "as agent of the operator of and
 (NAME OF APARTMENTS, COURT, ETC.)
 herein called guest, whereby the guest rents from said operator those certain premises known and described as

No. 112 located at California, for tenancy from month to month commencing on the 15 day of April, 1948 and at a monthly rental of Dollars
 (APT., ROOM, SUITE, UNIT)
112

Which rental the said guest expressly agrees to pay each month in advance, commencing on the day last mentioned. It is agreed that the tenancy hereby created shall terminate at 12:00 o'clock Noon on the day of the termination of the tenancy. It is further agreed that the said premises shall be occupied by no more than 2 adults and 1 children.

This agreement is subject also to the following covenants and conditions:
 1. Any failure by guest to pay rent or other charges upon day due, or to comply with any other term or condition hereof shall terminate forthwith this tenancy, at the option of operator, and the guest hereby expressly waives any notice to quit and surrender possession of said premises, and operator or his agent may enter said premises and take and retain possession of the same and exclude guest therefrom.

2. Said tenancy may be terminated by either party by giving written notice to the other of intention to terminate at least SEVEN (7) days before the expiration of the term of tenancy, and said operator or his agent shall have the right to enter and take possession of said premises upon expiration of said notice in addition to any other remedy provided by law. Operator may change the terms of this agreement at any time by giving written notice to guest of such change or changes at least SEVEN (7) days before expiration of the term of this tenancy.

3. In the event of failure by guest to give notice herein required of his intention to terminate this tenancy, he shall be liable for another term, and in event he shall abandon, or attempt to abandon, said premises or remove his property from said apartment, the rental for such additional term shall, at the option of operator, become immediately due and payable.

4. Failure by operator to exercise any of his rights arising under this agreement shall not be considered a waiver of any right or condition thereof.

5. Guest agrees that he will not keep or permit to be kept in said premises any dog, cat, parrot or other bird or dumb animal.

6. Guest agrees not to violate any City ordinance or State law in or about said premises.

7. Guest agrees to pay the following as a part of the rental of said premises: all charges for electricity, gas and telephones and all charges for laundering of linens, blankets and curtains of said premises; also to pay the operator, in advance, at least one week before the termination of this tenancy, the following: the reasonable estimated cost of laundering blankets and curtains of said premises after vacation thereof, and for cleaning said premises \$3.00 for quarters of two rooms and bath or less, or \$5.00 for quarters of three or more rooms and bath after vacation thereof.

8. Upon incurrence by guest of any charge it shall become immediately due and payable.

9. Guest shall not transfer his interest in or to this agreement, nor shall guest assign or sublet said premises.

10. Guest hereby agrees in event suit is instituted to collect any of the moneys due under this agreement, or for damages to said property, that he will pay such additional sum for attorney's fees, as the Court may adjudge reasonable.

11. Date of payments, rate of rental, conditions of agreement or term of tenancy may be changed by mutual agreement of the parties, endorsed hereon, without affecting or changing any other part of this agreement.

12. Operator reserves the right to himself or his agent to enter said premises at reasonable times to inspect or clean same or for any other lawful purpose.

13. It is agreed that operator shall not be liable or responsible in any way for loss of or damage to any article belonging to said guest, or located in said premises, or other premises under control of operator; that no right of storage is given by this agreement and that operator is not liable for non-delivery of messages.

14. Nothing contained in this agreement shall be construed as waiving any of operator's rights under laws of the State of California.

15. Guest hereby acknowledges receipt in good condition of furniture and equipment listed hereunder, and agrees to pay for all breakage, loss and damage thereof.

FURNISHINGS		KITCHEN UTENSILS	
Ash Tray	Table Lamp	Sherberts	Knives and Forks
Beds	Towel Rack	Sugar Bowl	Match Box
Carpet	Vase	Tumblers	Mop
Chairs	Waste Basket	Vinegar Cruet	Measuring Cup
Chifonier		Water Pitcher	Milk Pan
Consoles		Wine Glasses	Mixing Bowl
Console Table	CHINA		Muffin Tin
Coffee Table	B. and B. Plates	SILVER	Paring Knife
Davenport	Bouillon Cups	Butter Knife	Perculator
Day Bed	Bowls	Forks	Pie Tins
Desk	Creamer	Knives	Potato Masher
Dining Table	Cups	Solid Forks	Pudding Pan
Dresser	Dinner Plates	Soup Ladles	Refrigerator
Dressing Table	Egg Cups	Soup Spoons	Roasting Pan
Dressing Table Bench	Glasses	Sugar Spoons	Rolling Pin
Dressing Table Stool	Gravy Boat	Table Spoons	Salt Box
End Table	Oat Meal	Tea Spoons	Sauce Pans
Floor Lamp	Platters		Scrub Brush
Keys	Pie Plates	LINENS	Shakers
Mattress	Sauce Dishes	Bath Mat	Sink Strainer
Mazda Lamps	Saucers	Bath Rug	Skillet
Mirror	Soup Plates	Bath Towels	Soap Dishes
O'stuffed Chair	Tea Plates	Comforts	Soup Strainer
O'stuffed Rocker	Tea Pots	Dresser Top	Sugar Canister
O'stuffed Bed Couch	Trays	Face Towels	Table Mats
Pictures	Vegetable Dish	Kitchen Towels	Table Spoon
Pillows		Mattress Cover	Tea Canister
Pr. Draperies	GLASS	Napkins	Tea Kettle
Pr. Window Curtains	Creamer	Pair Blankets	Tea Spoons
Rockers	Fruit Bowls	Pillow Slips	Tea Strainer
Runner	Fruit Dishes	Scarfs	Tin Lids
Rugs	Jelly Dish	Sheets	Toaster
Small Rugs	Lemon Squeezer	Shower Curtains	Wire Fork
Shades	Oil Cruet	Silence Cloth	
Slipper Chair	Pepper Shaker	Spreads	
Smoking Sets	Salt Shaker	Table Cloths	
Soap Rack	Pickle Tray		

16. This agreement shall inure to the benefit of the operator and his successors in interest.

IN WITNESS WHEREOF, both parties have set their hands the day and year first above written.

Y. S. [Signature] 71 [Signature]
 *Operator/Agent
 Guest in Possession

NOTE: Strike out inapplicable words.
 NEW 1007 UNIVERSAL HOTEL SERVICE CO. LOS ANGELES

[Endorsed]: Filed Feb. 11, 1948.

(Testimony of Harold Cousins.)

Q. By Mr. Jacobs: How many people occupied apartment 412 in April of 1942?

A. Myself and my wife and my son, three people.

Q. How many people occupy the apartment now? A. Three people, the same amount.

Q. It has been occupied by three people from March of 1942 to date? A. Yes, sir.

Mr. Lynch: I move that the answer of the witness be stricken on the ground that the witness testified that he only moved in in April and not in March. He doesn't know what the rent was in March and how many people were in occupancy, so it is a conclusion of the witness as to what was paid in March.

Mr. Jacobs: Will you read the question back?
(Question read.)

Mr. Lynch: Object to it on the ground the witness is testifying as to a conclusion it was occupied. He testified he didn't move in until April so he obviously doesn't know what the occupancy was in March.

Mr. Jacobs: I will withdraw the question.

Q. By Mr. Jacobs: It has been occupied by three people from April 1942 to date?

A. From April 15th, 1942.

Q. Are you acquainted with a Mr. Dallas Mead?

A. No, sir, I am not.

Q. Did you ever see a Dallas Mead?

A. No, sir, I did not.

(Testimony of Harold Cousins.)

Q. Did anyone—did any mail arrive at Apartment 412 as far as you know for Mr. Mead?

A. No, sir.

Mr. Lynch: Just a minute. I object to this as wholly immaterial, whether mail did or did not arrive for Mr. Dallas Mead.

The Court: I don't know what it is going to lead up to. It may be admitted. You may proceed.

Mr. Jacobs: No more questions, your Honor.

Mr. Lynch: I have no questions.

The Court: You are excused.

Mr. Jacobs: The plaintiff will rest.

Mr. Lynch: The defendant has no testimony. The defendant rests.

The Court: Proceed with the argument.

Mr. Jacobs: According to the pre-trial stipulation, your Honor, we have agreed as a matter of fact what the legal maximum rent on the apartment was, but the rent paid on Apartment 412, occupied by Mr. Cousins between May 15th, 1944, and August 15th, 1947, was \$47.50 a month.

Now, I have shown by Mr. Cousins' testimony that he moved in in April of 1942; that three people moved in the [21] apartment at that time and that the rent charged him at that time was \$37.50.

I have in evidence here an inventory which shows that the defendant landlord knew that three people were moving in at that time and that he charged \$47.50 at that time. That April 15th, 1942, was the next month after the maximum legal rent date,

which was March of 1942, one month afterwards—that is the evidence of what the legal maximum rent was for this apartment. Three people moved in in April and were charged \$47.50. That went on for 25 months, according to the testimony, and then the landlord raised the rent to \$57.50. Increased the rent \$10.00 a month.

The evidence is conclusive in this situation that the legal maximum rent was \$47.50 because the housing regulations provide that in the event that the housing accommodations are not rented in March that the first time they are rented after March 1942 determines the legal maximum rent.

Now, it might have been possible for the defendant to present evidence here that these premises were rented in March 1942 but he hasn't chosen to do so.

There is just one fact in evidence as far as the renting of these premises is concerned and that again in April of 1942. At that time the rent for three people was \$47.50 and consequently on the evidence introduced here in court that is the legal maximum rent and the rent of \$57.50 [22] per month that has been collected between May 15th, 1944, and August 15th, 1947, is an overcharge of \$10.00 a month.

The Court: And what do you claim that was?

Mr. Jacobs: That totals the sum of \$380.00.

Mr. Lynch: If the court please, it seems indisputable to me that the burden is on the expediter to show that the maximum rent was other than the

rent collected and that there has been a violation. However, our witness has just come into the room and with the court's permission I would like to re-open as far as the defendant is concerned, and put on the testimony as to the occupancy on March 1st, which was the rent control date.

The Court: You may do so.

OLIVER G. PIRIE

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Pirie, Oliver G.

Direct Examination

By Mr. Lynch:

Q. What is your address, Mr. Pirie?

A. 5307 La Mirada Avenue, Hollywood. [23]

Q. Mr. Pirie, are you the father-in-law of Dallas Mead?

A. I was the father-in-law of Dallas Mead.

Q. Do you know where Dallas Mead was residing in March of 1942?

A. I can't say all of March. Sometime in the early part of March or toward the middle he and my daughter broke up housekeeping. They were living at that time at the Fountain Manor.

Q. On the first day of March of 1942 they were living at the Fountain Manor in Hollywood?

A. As best my memory serves me.

(Testimony of Oliver G. Pirie.)

Q. And at that time how many people were occupying the apartment which they were renting?

A. They were newlyweds.

Q. Just two people?

A. Just two people.

Mr. Lynch: That is all.

Mr. Jacobs: No questions. Do you rest, Mr. Lynch?

Mr. Lynch: No, just one minute. I would like to call Mr. Richman.

FREDERICK I. RICHMAN

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows: [24]

The Clerk: State your full name.

The Witness: Frederick I. Richman.

Direct Examination

By Mr. Lynch:

Q. Mr. Richman, you are one of the defendants in this case? A. Yes, sir.

Q. And Lyda Blithe Richman Nagel is your sister? A. Correct.

Q. And you and Mrs. Nagel are the trustees of the Richman Estate? A. Yes, sir.

Q. And that estate is the owner of the property known as the Fountain Manor?

A. That is right.

Q. In which is situated this particular apart-

(Testimony of Frederick I. Richman.)

ment which has been occupied by Mr. Harold Cousins since April of 1942?

A. I don't know as to when he moved in. The trust didn't acquire the property until January of 1944.

Q. But you are the owner of it at the present time? A. Yes, sir.

Q. As such trustee? A. Yes, sir. [25]

Q. Mr. Richman, I show you what purports to be notice to landlord of proceedings to determine the maximum rent and ask you if that document was received by you on or about July 11th, 1945?

A. Shortly thereafter.

Q. And there is attached to that a maximum rent for rooms rented or offered for rent schedule which lists this particular apartment and was in reference to this particular apartment. It was in reference to this particular apartment, was it not?

A. Well, the Fountain Manor is registered under what is known as the hotel and rooming house registration which registration provides daily, weekly and monthly rates for one, two and three people. That was the registration as of March 1st, 1942.

The registration which was filed with the OPA at that time listed for apartment 412 a daily rate of \$3.00, \$3.00 and \$3.50. For one, two or three persons a weekly rate of \$15.00, \$15.00 and \$16.50.

For one, two or three persons a monthly rate of \$47.50, \$47.50, and \$57.50.

(Testimony of Frederick I. Richman.)

This notice to landlord of proceedings to determine maximum rents proposed to reduce the rent on Apartment 412 insofar as monthly rates were concerned, to \$45.00, \$45.00 and \$57.50 for one, two and three people. [26]

Q. Mr. Richman, do you have the registration of this particular apartment as of March 1st, 1942?

A. I have the registration as was turned over to me, yes.

Q. Will you get that?

A. Do you mean the OPA registration or the house registration from which the OPA registration was prepared?

Q. Let us have the OPA registration.

A. Yes.

Q. What does the OPA registration list as the rental for this property?

A. \$3.00, \$3.00 and \$3.50 for one, two and three persons on a daily rate.

\$15.00, \$15.00 and \$17.50 for one, two or three persons on a weekly rate.

\$57.00—\$47.50, \$47.50 and \$57.50 for one, two or three persons on a monthly rate.

Q. In other words, it was registered as \$57.50 for three persons? A. That is correct.

Mr. Jacobs: I object to that and move the answer be stricken. I think the registration should be introduced into evidence.

Mr. Lynch: I am willing that be done except we only have this one and I thought since the Gov-

(Testimony of Frederick I. Richman.)

ernment is involved [27] and I know they are acting as prosecutor and not persecutors; that they are very liberal about the use of records and I assume that they will stipulate that that is the fact.

Mr. Jacobs: I will stipulate that is the registration.

Mr. Lynch: Thank you.

The Court: Do you insist on your motion?

Mr. Jacobs: Yes, your Honor—No, I will withdraw the motion and stipulate that is the registration.

Mr. Lynch: We have it, but it is our only copy.

Q. By Mr. Lynch: Now, was there turned over to you at the time you acquired the apartment a statement made up by the owner as to the registration of the property? A. There was.

Q. Do you have that statement? A. I do.

Mr. Jacobs: You don't need to question him about that. You can read that into evidence.

Mr. Lynch: The former owner, H. E. Weitz, reported this property as being occupied by two people on the rent control date.

Mr. Jacobs: Yes.

Mr. Lynch: Thank you, counsel. At \$47.50, \$47.50 a month.

Q. By Mr. Lynch: Now, I show you a notice dated August 26th, 1946, from the Los Angeles Defense Rental Area [28] and ask you if you received that on or about the date it bears?

A. I did.

(Testimony of Frederick I. Richman.)

Q. And is there a reference in that document to the rent for this particular apartment?

A. There is. This is a continuation of the docket number of the original proceeding which you just mentioned or identified heretofore, to determine the maximum rent. This is an order from the Area Rent Director. The other was a proceeding.

Mr. Lynch: Will counsel stipulate with me that the order from the Area Rent Director dated August 26th, 1946, fixes the maximum rent for the apartment here in question at \$47.50 for one person, \$57.50 for two persons, and \$57.50 for three persons.

Mr. Jacobs: I will so stipulate.

Mr. Lynch: That is all.

Mr. Jacobs: No cross-examination.

Mr. Lynch: The defendant rests.

Mr. Jacobs: I have no more evidence, your Honor.

The Court: How many people have been occupying this place?

Mr. Lynch: Three.

Mr. Jacobs: Three people.

The Court: You agree on that? [29]

Mr. Jacobs: No question about that.

If the Court please, this case has taken a rather

strange turn because I believe that both counsel for defendants and myself had in mind a trial of the case * * *.

(Argument reported but not transcribed at the request of Mr. Jacobs.)

The Court: In the second paragraph of the complaint there is a prayer for injunction. Do you insist on an injunction?

Mr. Jacobs: No, we don't insist on an injunction. That was a relief that was asked for when we drew the original schedule which has since been cut down.

The Court: That being the case the findings of the court will have to be for the defendants. You will prepare the decree.

Mr. Lynch: Yes.

The Court: Do you waive findings?

Mr. Jacobs: No, I wouldn't want to waive findings.

The Court: Then that concludes the matter.

(Whereupon, at 2:45 o'clock p.m., the above entitled matter was concluded.) [30]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified

therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of May, A.D. 1948.

/s/ J. D. AMBROSE,
Official Reporter.

[Endorsed]: Filed June 28, 1948.

[Endorsed]: No. 11970. United States Circuit Court of Appeals for the Ninth Circuit. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellant, vs. Frederick I. Richman and Lyda Blithe Richman Nagel, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed July 8, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11970

TIGHE E. WOODS, Housing Expediter,
Office of the Housing Expediter,
Appellant,

vs.

FREDERICK I. RICHMAN and LYDA BLITHE
RICHMAN NAGEL, HANNAH E. WEITZ,
heretofore sued as Doe I and Doe II,
Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY
ON APPEAL

The District Court erred in:

1. Excluding all evidence of rental overcharges received prior to July 1, 1947.
2. Finding that the Court was without jurisdiction under sections 205(c) and 205(e) of the Emergency Price Control Act. (Second finding of fact.)
3. Concluding that Section 205 of the Emergency Price Control Act barred recovery of rental

overcharges for Apartment No. 407. (Second conclusion of law.)

4. Entering final judgment for defendants.

Dated this 23rd day of July, 1948.

/s/ ED DUPREE,

General Counsel,

/s/ HUGO V. PRUCHA,

Assistant General Counsel,

/s/ FRANCIS X. RILEY,

Special Litigation Attorney,

Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed July 26, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

Appellant, Tighe E. Woods, as Housing Expediter, Office of the Housing Expediter, hereby designates the following portions of the Record to be included in the Record on Appeal.

1. The complaint filed August 15, 1947.
2. The amended complaint filed October 10, 1947.
3. The answer of defendants Frederick I. Richman and Lyda Blithe Richman Nagel, filed November 3, 1947.

4. Dismissal with prejudice as to defendant Hannah E. Weitz, filed December 31, 1947.

5. Transcript of the trial beginning after the noon recess on February 11, 1948, including all exhibits, but omitting the final arguments of counsel.

6. Plaintiff's objections to the proposed findings of fact and conclusions of law, filed March 16, 1948.

7. The findings of fact and conclusions of law, filed March 19, 1948.

8. Judgment of the Court entered March 19, 1948, in Civil Order Book 49 at Page 382.

9. Notice of Appeal filed May 21, 1948.

10. Statement of Points upon which appellant intends to rely upon appeal.

11. Designation of Record in Court below.

12. This Designation.

Dated this 23rd day of July, 1948.

/s/ ED DUPREE,

General Counsel,

/s/ HUGO V. PRUCHA,

Assistant General Counsel,

/s/ FRANCIS X. RILEY,

Special Litigation Attorney,

Attorneys for Appellant.

[Endorsed]: Filed July 26, 1948. Paul P. O'Brien, Clerk.

No. 11970

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

v.

**FREDERICK I. RICHMAN AND LYDIA BLITHE RICHMAN
NAGEL, APPELLEES**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION**

BRIEF OF APPELLANT

ED DUPREE,

General Counsel,

HUGO V. PRUCHA,

Assistant General Counsel,

CECIL H. LICHLITER,

Special Litigation Attorney,

*Office of the Housing Expediter, Office of the General Counsel,
4th and Adams Drive SW., Washington 25, D. C.*

FILED

SEP 21 1948

WILLIAM P. O'BRIEN

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11970

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

v.

**FREDERICK I. RICHMAN AND LYDIA BLITHE RICHMAN
NAGEL, APPELLEES**

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

The Housing Expediter appeals from a final judgment of the United States District Court for the Southern District of California, Central Division which denied injunctive relief and decreed that plaintiff, the Housing Expediter, "take nothing" (R. 35), in an action brought to enforce compliance with both the Emergency Price Control Act of 1942 as amended (50 U. S. C. App., Secs. 901, et seq., hereinafter referred to as "the Act of 1942" or "the 1942 Act"), and the Housing and Rent Act of 1947 (50 U. S. C. App., Secs. 1881, et seq., hereinafter called "the Act of 1947" or the "1947 Act").

Jurisdiction of the District Court was invoked by Sections 205 (a), (c), and (e) (50 U. S. C. App., Secs. 925 (a), (c), and (e)) of the Act of 1942, and by Sections 206 (b) and 204 (a) (50 U. S. C. App., Secs. 1896 (b) and 1894 (a) of the Act of 1947 (R. 6-7, 8-9).

Final judgment was entered on March 19, 1948 (R. 34-35). Notice of Appeal was filed May 21, 1948 (R. 35-36). Jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. Sec. 225).

STATEMENT OF THE CASE

This appeal raises the substantial question whether the Court below erred in holding that the Emergency Price Control Act of 1942, as amended, did not continue in force after termination thereof on June 30, 1947, with respect to rent overcharges alleged to have been received by the defendants prior to such termination date (R. 42). Other questions are presented by the trial Court's exclusion of testimony respecting such alleged overcharges, and in failing to grant relief to plaintiff, on behalf of the United States, either by judgment for statutory damages under Section 205 (e) of the 1942 Act (*infra*, p. 21), or by restitution to tenants of the overcharges under Section 205 (a) (*Infra*, p. 21) (R. 41-43, 33). These questions and other rulings by the trial Court as a result of which plaintiff was denied any relief which the complaint prayed (R. 9-10), stem essentially from the basic determination by the Court below that the 1942 Act ceased to be in any respect operative from June 30, 1947, so that upon trial "the scope of the

evidence," as the Court held, was "limited to the status quo of the parties when the new Act of 1947 was passed and for acts between the parties from there on" (R. 42).

On June 30, 1947, the Act of 1942 expired by its terms. Section 1 (b) thereof (the savings clause), provided in effect that the provisions of the Act and all regulations thereunder "shall be treated as still remaining in force" for the purpose of sustaining any suit with respect to "offenses committed, or rights or liabilities incurred" prior to the termination date (*infra*, p. 20). On July 1, 1947, the Act of 1947 went into effect. Under this Act, authority to administer the powers, functions, and duties thereunder was conferred by Congress on the Housing Expediter, to whom rent control was transferred, and who "was retained as the official to administer the [rent control] law" (Sen. Conf. Rep., Cong. Rec. June 19, 1947, p. 7439; Sen. Rep. No. 86, 80th Cong., 1st Sess., p. 2). Section 204 (a) of the 1947 Act provides that the Housing Expediter shall administer the powers, functions, and duties as therein provided (*infra*, p. 22).

THE FACTS

The facts are substantially as follows: The rental premises here involved are located at 5165 Fountain Avenue, in Los Angeles, California (R. 8). The complaint refers to the building there situated, and containing the living units from which the defendants received rent, as the Fountain Avenue Apartments (R. 8). In the answer of defendants, such building is described as the Fountain Manor Apartment Hotel

(R. 16, 22). Prior to January 1944, the then owner of the premises, H. E. Weitz, registered the apartments in said building as controlled housing accommodations within the meaning of the Act of 1942, and the Rent Regulations issued thereunder (R. 54, 55, 56).¹ In January 1944, appellees, Frederick I. Richman and Lyda Blithe Richman Nagel (hereinafter referred to as the defendants), acquired ownership of the property and thereafter received rents from tenants of apartments (R. 8, 22, 18).¹

The amended complaint,² filed October 10, 1947, was brought pursuant to Section 205 (a) of the 1942 Act and pursuant also to Section 206 (b) of the Act of 1947 (*infra*, p. 23) to enforce compliance with both Acts and the Rent Regulations issued thereunder, and for treble damages on behalf of the United States as provided by Section 205 (e) of the Act of 1942 (R. 6-7, 9). The complaint alleged in substance that the defendants had received from occupants of the said apartment housing accommodations amounts in excess of the maximum legal rents established by the said Rent Regulations (R. 8), and by such acts and practices the defendant had violated Section 4 (a) (*infra*, p. 20) of the 1942 Act and the Rent Regulation for Housing (10 F. R. 13528) issued pursuant thereto (R. 9). A schedule made a part of the complaint set

¹ Hannah E. Weitz, former owner of the rental premises, was dismissed as a party-defendant prior to trial of the action February 11, 1948 (R. 24).

² The action was instituted August 15, 1947, by the former Housing Expediter, Frank R. Creedon (R. 2, 6), for whom Tighe E. Woods, as Housing Expediter, was substituted as plaintiff (R. 45.)

forth the amount of overcharges alleged to have been received by the defendants, with the apartment numbers, the names of the several tenants from whom collected and the dates of such overcharges extending from the month of January 1944, to and including the month of September 1947 (R. 8, 12-13). The complaint prayed (1) for judgment under Section 205 (e) of the 1942 Act for treble the total overcharges received in excess of the maximum legal rents, (2) that the defendants be ordered to refund to the tenants thereto entitled, all amounts in excess of maximum rents established by the Act, which had not been previously refunded, and (3) that the defendants be enjoined from demanding or receiving for the housing accommodations involved, rents in excess of the legal maximum permitted under the Rent Regulation for Housing, or any other Regulations issued pursuant to the Act of 1947 (R. 9-10).

The answer of the defendants, filed November 3, 1947 (R. 24), denied that on or since July 1, 1947, the housing accommodations referred to in the complaint were subject to maximum rents under the Housing and Rent Act of 1947, or otherwise (R. 15). With reference to the schedule of alleged overcharges made a part of the complaint (R. 12-13), the answer alleged that, since June 30, 1947, certain of the apartments there listed had not been subject to any maximum rent (R. 17-19). As to certain other apartments, the answer set forth that, at various dates prior to institution of the present action, the defendants had "restored" or "repaid" to occupants thereof amounts received in excess of the monthly rent of such apart-

ments as fixed by "the then Office of Price Administrations" (R. 17, 18, 19). After the filing of the answer, a stipulation between plaintiff and defendants of January 27, 1948, amended such schedule by eliminating therefrom all items of alleged overcharges, except the following (R. 29):

Apt.	Tenant's name	Period of occupancy	Rent collected	Maximum legal rent	Amount of overcharge
407	Mrs. Russell Simpson.	May 1, 1944, to Apr. 10, 1946.	\$75.00 per mo..	\$65.00-----	\$233. 53
412	Mr. Harold Cousins...	May 15, 1944, to Aug. 15, 1947.	\$57.50 per mo..	\$47.50 per mo..	380. 00
				Total ..	\$613. 35

Upon the parties announcing ready for trial on February 11, 1948 (R. 41), and before the introduction of any testimony, the trial Court upon "an analysis of the two Acts" (R. 41), held "the scope of the evidence" to be "limited" to those violations arising after June 30, 1947, as earlier pointed out (*supra*, p. 23), and also that "if Congress wanted to keep the relief for past rent question in the Act of 1947, it would have said so, but they didn't" (R. 42). The lower Court accordingly sustained the contention of defendants that with respect to the alleged overcharges from the tenant of Apartment No. 407, that "There is just no violation there now," and refused to admit any evidence respecting such item (R. 43).

From the same "analysis of the two Acts" (R. 41), the trial Court determined that "If Congress intended to grant restitution for rents in the Act of 1947, it would have said so" (R. 42). After hearing evidence from both parties as to alleged overcharges on the

remaining apartment No. 412 (R. 46-58), the Court announced that the findings “will have to be for the defendants” (R. 58). From the judgment thereafter entered, which denied the issuance of an injunction and decreed that “plaintiff take nothing herein” (R. 34-35), the present appeal is taken (R. 35).

SPECIFICATIONS OF ERROR

1. The Court below erred in excluding all evidence of rental overcharges received prior to July 1, 1947, from Apartment No. 407 (R. 60).

2. The Court below erred in finding that it was without jurisdiction under Section 205 (c) and 205 (e) of the Emergency Price Control Act (Second Finding of Fact) (R. 60).

3. The Court below erred in concluding that Section 205 of the Emergency Price Control Act barred recovery of rental overcharges for Apartment No. 407 (Second Conclusion of Law) (R. 60).

4. The Court below erred in entering final judgment for defendants (R. 61).

ARGUMENT

I

The lower Court erred in refusing to give effect to the 1942 Act after the expiration date

That the Court below wholly misconceived the relief to which plaintiff was entitled under both the Emergency Price Control Act of 1942, as amended, and the Housing and Rent Act of 1947 (R. 6, 9), is disclosed by the following rulings at the commencement of the trial (R. 41):

The COURT. The question presented at this time is whether the Act of 1942, under which the present action is brought, applies, and is exclusive, or whether the Act of 1947 applies and is exclusive.

In referring to "the Act of 1942" the Court said (R. 41-42) :

Under that Act acts were barred after the expiration of one year, so it seems that the acts here done before the 1947 Act was adopted, were beyond one year and Congress only kept alive acts done after the adoption of the Act of 1947.

The scope of the relief here sought is provided for and governed by the Act of 1947 which limits acts performed after its adoption and providing for injunctive relief to preserve future acts and pertains to the enforcement of the Act of 1947 and preserves the status quo of the parties. * * *

The Act of 1942 was dead on June 30th, 1947, and there was no more law in the country. Then Congress took up the matter and said, "We will extend it to only," as I construe the Act, "to acts in the future and to grant injunctive relief and hold the parties in status quo" and not for the recovery of back rents.

Such rulings of the trial Court were clearly erroneous. The lower Court in the first place overlooked that the amended complaint was brought not only under Sections 205 (a) and (e) of the Act of 1942, but also pursuant to Section 206 (b) of the Act of 1947. In the second place the Court below overlooked the fact that, under Section 1 (b) of the Act, liabilities arising thereunder are saved for redress. This contention will be discussed below.

1. The Savings Clause of the Act of 1942 continued such Act in force with respect to alleged violations thereof prior to the termination date

It is clear that the lower Court disregarded completely the savings clause (Section 1 (b)), of the Act of 1942 by which the provisions thereof are expressly "treated as still remaining in force for the purpose of sustaining" any suit or action with respect "to offenses committed, or rights or liabilities incurred," prior to the termination date (*infra*, p. 20).

This Court in *Gorden v. Porter*, 156 F. 2d 799 (C. C. A. 9th), certiorari denied, 329 U. S. 763, gave effect to such savings clause in holding that the question whether the 1942 Act had been violated prior to the termination date, had not become moot. The Supreme Court and many other Circuit Courts of Appeal have also held that in view of Section 1 (b) liabilities incurred under the Act prior to its expiration were not thereafter washed out. As the Supreme Court said in *Fleming v. Mohawk Wrecking and Lumber Co.*, 331 U. S. 111, at pps. 114, 119:

The Act was amended in 1946 to provide for its termination not later than June 30, 1947, saving, however, rights and liabilities incurred prior to the termination date. * * *

Liabilities incurred prior to the lifting of controls are not thereby washed out. *United States v. Hark*, 320 U. S. 531, 536; *Utah Junk Co. v. Porter*, 328 U. S. 39, 44; *Collins v. Porter*, 328 U. S. 46, 49. And Congress has explicitly provided that accrued rights and liabilities under the Emergency Price Control Act are preserved whether or not suit is started prior to the termination date of the Act.

See also, Woods v. Hills, decided May 10, 1948, 334 U. S. 210, 214, rehearing denied, 334 U. S. 856; *Porter v. American National Bank and Trust Company*, 161 F. 2d 504 (C. C. A. 7th); *Fleming v. Goodwin*, 165 F. 2d 334, 338 (C. C. A. 8th), certiorari denied, 68 S. Ct. 1338; *Quirk v. United States*, 161 F. 2d 138 (C. C. A. 8th); *150 East 47th Street Corporation v. Porter*, 156 F. 2d 541 (Em. Ct. App.); *Standard Kosher Poultry, Inc. v. Clark*, 163 F. 2d 430 (Em. Ct. App.); *Bartlett v. United States*, 166 F. 2d 920 (C. C. A. 10th).

The effect of the trial Court's erroneous ruling in holding the 1942 Act no longer in effect was to eliminate completely plaintiff's claim for relief as to any alleged overcharges prior to June 30, 1947. Under Section 205 (e) of the Act, plaintiff was entitled to judgment on behalf of the United States for the statutory damages therein provided (*infra*, p. 21). Under Section 205 (a) (*infra*, p. 21), and as determined in *Porter v. Warner Holding Company*, 328 U. S. 395, plaintiff was also entitled to judgment directing the defendants to restore to the tenants all amounts collected in excess of the lawful maximum rent. The complaint specifically prayed such relief (R. 9-10). Respecting both Apartments 407 and 412, overcharges prior to June 30, 1947, were alleged (R. 29). By refusing to give any effect to the 1942 Act after its expiration date, the lower Court clearly committed error. Other rulings of the trial Court which follow from this basic erroneous determination will be briefly considered in argument hereafter following.

2. The Court below erred in holding as a matter of law that plaintiff had no cause of action with respect to alleged overcharges received by defendants from the tenant of Apartment 407, prior to June 30, 1947, and in excluding at trial any evidence of such overcharges

The amended complaint among other alleged overcharges by defendants set forth the following item (R. 29) :

Apt. 407. Tenant's name, Mrs. Russell Simpson; Period of occupancy, May 1, 1944, to April 10, 1946; Rent collected, \$75.00 per mo.; Maximum legal rent, \$65.00; Amount of overcharge, \$233.53.

However "at the commencement of the trial" the Court below determined "That is a matter of law the plaintiff had no cause of action on account of the alleged violations relating to Apartment No. 407" (Recitals of Findings of Fact and Conclusions of Law, R. 30). The error of reaching such conclusion is very clearly disclosed by the following trial proceedings (R. 42).

After holding that "The Act of 1942 was dead on June 30th, 1947," and that any rent control thereafter did not extend to "the recovery of back rents" (R. 42), the lower Court made the following further rulings before the introduction of any testimony (R. 42) :

* * * my conclusion, gentlemen, is that in this present action the scope of the evidence is limited to the status quo of the parties when the new Act of 1947 was passed and for acts between the parties from there on.

It appears clear to me that if Congress wanted to keep the relief for past rent question in the Act of 1947, it would have said so, but

they didn't. They dropped it and that Act has gone out of existence. It is terminated. Now, there is nothing before us other than acts committed since the 1947 Act—injunctive relief, in other words.

If the tenants were in possession of the property at the time of the 1947 Act were complying with their contracts or with the regulations the Act of 1947 would protect them in preventing the landlord from throwing them out. That is the only question here.

By such ruling, the Court below again disregarded the savings clause of the 1942 Act which preserved plaintiff's right to relief as the complaint prayed (R. 9-10), upon proof of overcharges between May 1, 1944, and April 10, 1946, which the above item alleged (R. 29). In addition to the recovery of treble damages under Section 205 (e) of the 1942 Act, the complaint also prayed that the defendants be ordered to restore to the tenant all amounts collected in excess of the maximum legal rent (R. 9-10). As later pointed out in the present brief (*infra*, p. 16), such right of restitution under Section 205 (a) of the Act, and for the benefit of the tenant alone, is wholly separate and distinct from the right to statutory damages accorded the Housing Expediter, and on behalf of the United States, under Section 205 (e). To the enforcement of such right the limitation of one year "from the date of the occurrence of the violation" in which to institute an action for recovery, as provided in Section 205 (e), presents no bar (*infra*, p. 21). Plaintiff therefore was entitled to introduce evidence of the overcharges alleged.

However upon being informed that the tenants were still in possession of the housing accommodations (R. 43), the trial Court continued to disregard any application of the savings clause of the 1942 Act by the following ruling and concurrence in the statement of defendants' counsel (R. 43):

The COURT. The scope of this inquiry here, if they [the tenants] have complied with the Act of 1947, would go only to the granting of injunctive relief and maintaining their possession if they desire it.

That is the conclusion I have reached, gentlemen, so you may proceed with your evidence.

Mr. LYNCH. That has eliminated entirely from consideration the Russell Simpson matter in Apartment No. 407. There is just no violation there now.

The COURT. The plaintiff is granted an exception to the rule of the court.

Plaintiff was prepared to offer proof by the testimony of three witnesses "relative to rent collections before June 30, 1947," and respecting the alleged overcharges as to the particular Apartment 407, but in view of the Court's rulings as stated, it was stipulated that "no formal tender of that testimony need be made," and such witnesses were excused (R. 45-46).

In thus disregarding the savings clause of the 1942 Act by holding that no cause of action existed as to the claim for rent overcharges received prior to June 30, 1947, and in refusing to admit any evidence in proof thereof, the Court below was clearly in error.

3. The Court below erred in holding that no jurisdiction of the action was conferred under Sections 205 (c) and 205 (e) of the Act of 1942

In Finding of Fact 2 (R. 31), the lower Court made the determination above stated that no jurisdiction of the action was conferred under Sections 205 (c) and 205 (e) of the Act of 1942. This was error. Section 205 (c) of the 1942 Act provides that the District Courts shall have jurisdiction of criminal proceedings for violation of Section 4 thereof, and concurrently with State Courts, "of all other proceedings under Section 205" (*infra*, p. 21). The complaint alleged the bringing of the present action "pursuant to Section 205 (a) to enforce compliance" with such Act and "for treble damages * * * pursuant to Section 205 (e)" (R. 6). The complaint further alleged that jurisdiction of the District Court "is conferred" by "Sections 205 (c) and 205 (e)" (R. 7). Section 205 (e) confers upon the Price Administrator the right to bring an action for the statutory damages there provided if the buyer of a commodity or the person from whom rent overcharges are exacted fails to institute an action for such recovery within thirty days from the date of the occurrence of the violation (*infra*, p. 21). The complaint specifically set forth that each of the tenants therein alleged to have been overcharged had failed to institute any action under such Section 205 (e), and that more than thirty days had elapsed since occurrence of the violations (R. 8). Under the savings clause of the 1942 Act, jurisdiction of the present action existed, and the contrary finding by the Court below was clearly erroneous.

4. The lower Court erred in holding that the provisions of "Section 205 of the Emergency Price Control Act of 1942, as amended," barred recovery of alleged rental overcharges as to Apartment No. 407

The second Conclusion of Law by the trial Court states the above determination (R. 33). It is somewhat difficult to ascertain upon what basis such conclusion was reached. Section 205 (a) of the 1942 Act pursuant to which the present action was brought (R. 6), provides no limitation period. On the other hand, this Section expressly authorizes the Price Administrator, (to whom the Housing Expediter is the successor), to make application in the appropriate court for an order enforcing compliance with the Act, and that upon a showing of violation as therein provided, "a permanent or temporary injunction, restraining order, or *other order* shall be granted without bond" (*infra*, p. 21). [Italics added.]

In holding that under the Act of 1942, "acts were barred after the expiration of one year," and that "Congress only kept alive acts done after the adoption of the Act of 1947" (R. 41), the Court below not only disregarded the savings clause of the 1942 Act, but also completely overlooked the right of plaintiff to have entered an "other order" as Section 205 (a) provided, compelling the defendants to make restitution to the tenants of all amounts collected prior to June 30, 1947, in excess of the maximum legal rental. The overcharges alleged to have been received from the tenant of Apartment 407 extended over the period from May 1, 1944, to April 10, 1946, and the complaint expressly prayed for such restitution (R. 9-10). But the trial Court further held

that "there is nothing before us other than acts committed since the 1947 Act—injunctive relief, in other words" (R. 42–43). The Court below thus entirely lost sight of plaintiff's right to the restitution of rentals already illegally exacted as distinguished from an injunction to restrain only future rent collections.

Considering Section 205 (a) of the 1942 Act, the Supreme Court held in *Porter v. Warner Holding Company, supra* (p. 10), that "An order for the recovery and restitution of illegal rents may be considered a proper 'other order,' " either as "an equitable adjunct to an injunction decree" (328 U. S. p. 399), or "as an order appropriate and necessary to enforce compliance with the Act" (328 U. S. p. 400). In connection with the second basis for equitable relief, the Court went on to say that (at p. 400) :

Section 205 (a) anticipates orders of that character, although it makes no attempt to catalogue the infinite forms and variations which such orders might take. The problem of formulating these orders has been left to the judicial process of adapting appropriate equitable remedies to specific situations. Cf. *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 194. In framing such remedies under Section 205 (a), courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interest while giving necessary respect to the private interests involved. The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy

of Congress. *Clark v. Smith*, 13 Pet. 195, 203.

The Supreme Court thus determined that by express language of the Act under which plaintiff brought the present action that restitution may be awarded as an equitable remedy separate and apart from an injunction decree or as an adjunct to such decree. And by the savings clause of the 1942 Act the right to such relief as to overcharges collected prior to the expiration date of June 30, 1947, was expressly preserved. In observing that "The Supreme Court in the *Porter* case * * * was construing acts under the Act of 1942" (R. 41), the Court below apparently referred to *Porter v. Warner Holding Company*, *supra*, but failed to follow such decision by holding that under such Act restitution was available to plaintiff as the complaint prayed.

In *Creedon v. Randolph*, 165 F. 2d 918 (C. C. A. 5th), where restitution of rent overcharges was sought by the Housing Expediter under Section 205 (a) of the 1942 Act, the Court said (165 F. 2d p. 920) :

It is a remedy which may be had in addition to the others set up in the Act, and an order of restitution may be granted with or without a prohibitory injunction.

Also, in *Bowles v. Skaggs*, 151 F. 2d 819 (C. C. A. 6th), the right to the relief of restitution was sustained separate and apart from any injunctive relief as to acts in the future.

Moreover, the right to restitution under Section 205 (a) is of a distinctly different nature from the right to statutory damages which the complaint prayed

(R. 9) under Section 205 (e), and is unaffected by the limitation of one year for bringing suit as such Section provides (*infra*, p. 21). The distinction between the two remedies is clearly pointed out in *Blood v. Fleming*, 161 F. 2d 292 (C. C. A. 10th) where the Court said (at p. 295) :

Section 205 (a) creates a cause of action separate from that set out in Section 205 (e). It confers broad equitable powers upon the court giving it power to grant injunctions, enter orders of restitution, or any other equitable order conducive to proper enforcement of the provisions of the Act. * * * Whether an action may be maintained under this section is not controlled by the one year limitation set up in Section 205 (e).

See too, *Warner Holding Co. v. Creedon*, 166 F. 2d 119 (C. C. 8th) ; *Creedon v. Randolph*, *supra*.

It follows that the Second Conclusion of law of the trial Court was clearly erroneous in holding that Section 205 (a) of the 1942 Act barred the recovery of alleged overcharges as to Apartment No. 407 (R. 33).

II

The Court below erred in entering final judgment for the defendants

The error of the trial Court in determining "as a matter of law" that "plaintiff had no cause of action on account of the alleged violations relating to Apartment No. 407" (R. 30), was no less harmful by reason of the Court's finding that the defendants had not engaged in any act or practice which violated the Housing and Rent Act of 1947, or regulations issued

pursuant thereto (Third Conclusion of Law, R. 33). Such Act and regulations were effective only from July 1, 1947, but the overcharges on account of which it was held no cause of action existed were alleged to have been collected prior to that date and while the 1942 Act was still in effect (R. 29). By the lower Court's ruling that proof of such overcharges was not embraced within "the scope of the evidence" at trial (R. 42, 43), plaintiff was deprived of relief which the complaint specifically prayed (R. 9-10), and which the savings clause of the 1942 Act preserved. From the trial Court's failure to give effect to such clause, it follows that there was no legal basis upon which judgment could properly be entered for the defendants.

CONCLUSION

The judgment should be reversed and the cause remanded, with directions to award to plaintiff the relief prayed, upon proof of the overcharges as to Apartment 407 which the complaint alleged.

Respectfully submitted.

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APPENDIX

EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED (50 U. S. C. APP., SECS. 901, ET SEQ.)

SECTION 1 (b). The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

SECTION 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

SECTION 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

SECTION 205 (c). The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. * * *

SECTION 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves

that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. * * *

HOUSING AND RENT ACT OF 1947 (50 U. S. C. APP., SECS. 1881, ET SEQ.)

SECTION 204 (a). The Housing Expediter shall administer the powers, functions, and duties under this title; and for the purpose of exercising such powers, functions, and duties, and the powers, functions, and duties granted to or imposed upon the Housing Expediter by title I of this Act, the Office of Housing Expediter is hereby extended until February 29, 1948.

SECTION 204 (b). During the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand,

accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such adjustments in such maximum rents as may be necessary to correct inequities or further to carry out the purposes and provisions of this title: * * *

SECTION 206 (a). It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204.

SECTION 206 (b). Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such subsection, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

RENT REGULATION FOR HOUSING (10 F. R. 13536), ISSUED PURSUANT TO EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED

SECTION 2 (a). *Prohibition against higher than maximum rents*—(a) *General prohibition*.—Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with

the use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received.

SECTION 4 (a). *Maximum rents*.—Maximum rents (unless and until changed by the Housing Expediter as provided in section 5) shall be:

(a) *Rented on maximum rent date*.—For housing accommodations rented on the maximum rent date, the rent for such accommodations on that date.

RENT REGULATION FOR HOUSING (12 F. R. 4331), ISSUED PURSUANT TO HOUSING AND RENT ACT OF 1947

SECTION 2 (a). *Prohibition against higher than maximum rents*—(a) *General prohibition*.—Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall offer, demand or receive any rent for or in connection with the use or occupancy on and after the effective date of this regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing.

SECTION 4 (a). *Maximum rents*—(a) *Maximum rents in effect on June 30, 1947*.—The maximum rent for any housing accommodation under this regulation (unless and until changed by the Expediter as provided in section 5) shall be the maximum rent which was in effect on June 30, 1947, as established under the Emergency Price Control Act of 1942, as amended, and the applicable rent regulation issued thereunder, except as otherwise provided in this section.

